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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 269

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., KARL HOBLITZELLE, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

No. 270

PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., VITAGRAPH, INC., RKO-RADIO PICTURES, INC., ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA

**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF TEXAS**

FILED AUGUST 12, 1938.



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[fol. 1]

**IN UNITED STATES DISTRICT COURT, NORTHERN
DISTRICT OF TEXAS**

In Equity. No. 3736-993

UNITED STATES OF AMERICA, Petitioner,

vs.

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., Karl Hoblitzelle, R. J. O'Donnell, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, Defendants

[fol. 2] **Findings of Fact and Conclusions of Law Requested
by Petitioner—Filed May 10, 1938**

**REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF
LAW**

United States of America, petitioner herein, submits the attached special findings of fact and conclusions of law and requests the court to adopt each of said special findings of fact and each of said conclusions of law as its findings of fact and conclusions of law in this cause.

United States of America, by Berkeley W. Henderson, Special Assistant to the Attorney General.

[fol. 3] **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to Equity Rule 70½, the court makes the following special findings of fact in this cause and reaches the following conclusions of law thereon:

Findings of Fact

1. Definitions

1. A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

2. First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality. Motion picture theatres giving first run exhibitions of feature pictures distributed by the distributor defendants will be referred to herein as first run theatres and those giving subsequent run exhibitions of such feature pictures will be referred to herein as subsequent run theatres.

3. Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

4. The words "admission price" as used herein mean a lower floor night admission price for adults.

5. Certain of the corporate defendants will be referred to herein by abbreviated titles as follows:

Defendants	Titles
Interstate Circuit, Inc.	Interstate
Texas Consolidated Theatres, Inc.	Texas Consolidated
Columbia Pictures Corporation	Columbia
Twentieth Century-Fox Film Corporation	Fox
Metro-Goldwyn-Mayer Distributing Corporation	Metro
Paramount Pictures Distributing Company, Inc.	Paramount
RKO-Radio Pictures, Inc.	RKO
United Artists Corporation	United Artists
Universal Film Exchanges, Inc.	Universal
Vitagraph, Inc.	Vitagraph

A Class A picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio at an admission price of 40¢ or more.

The restrictions as to admission price and against double features hereinafter referred to applied only to class A pictures.

[fol. 4] 6. The defendants Interstate, Texas Consolidated, Karl Hoblitzelle and R. J. O'Donnell will be sometimes referred to herein as the exhibitor defendants and the other defendants will be sometimes referred to herein as the distributor defendants.

II. The Defendants

7. Interstate operates 43 motion picture theatres located in Austin, Dallas, Fort Worth, Galveston, Houston and San Antonio. It operates all of the first run theatres in these cities except one in Houston which is affiliated with Metro. In each of these cities it operates two or more first run theatres which regularly charge an admission price of 40¢ or more. In addition it operates several subsequent run theatres in each of these cities. In all of these cities except Galveston there are other subsequent run theatres competing with Interstate's first run and subsequent run theatres.

8. Texas Consolidated operates 66 theatres, some of them first run and others subsequent run houses. These theatres are located in various Texas cities other than those in which Interstate operates theatres and in Albuquerque, New Mexico. In some of these cities there are no competing theatres and in the leading cities of Abilene, Albuquerque, Amarillo, El Paso, Waco and Wichita Falls there are no competing first run theatres.

9. Defendant Karl Hoblitzelle is president and defendant R. J. O'Donnell is general manager of both Interstate and Texas Consolidated and they are in active charge and control of the business and operations of these two corporations. Interstate and Texas Consolidated are affiliated with each other and with Paramount.

10. Defendant Metro-Goldwyn-Mayer Distributing Corporation of Texas is a subsidiary of and acts as the Texas agent for Metro. Defendant Twentieth Century-Fox Film Corporation of Texas is a subsidiary of and acts as the Texas agent for Fox. The other eight distributor defendants distribute motion picture films in interstate commerce throughout the United States. They solicit from exhibitors located in Texas applications for licenses to exhibit films; forward such applications to their New York offices, where they are granted; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered and redelivered to local [fol. 5] exhibitors; and finally reship the films to laboratories maintained outside of Texas. They distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States.

11. All of the feature pictures distributed by the distributor defendants are copyrighted and each distributor defendant either is the copyright proprietor of each picture distributed by it or has the exclusive right to license its exhibition in the United States.

III. The Conspiracy

12. On April 25, 1934, defendant O'Donnell addressed an identical letter (Agreed Statement of Facts Par. 10) written on Interstate's letterhead to the Texas branch manager, located at Dallas, of each distributor defendant. The letter stated that Interstate, in contracting for pictures for the coming 1934-1935 season, would insist that any picture shown first run in an Interstate theatre at an admission price of 40¢ or more should not be exhibited at any future time in the same city at an admission price of less than 25¢. On July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with the president of Paramount while attending a convention of that organization held in Los Angeles in June, O'Donnell sent a second letter (Agreed Statement of Facts, paragraph 11) written on Interstate's letterhead which was addressed jointly to the various Texas branch managers of the distributor defendants. In this letter he renewed and amplified his earlier demand and also demanded that any feature picture shown in a first run Interstate theatre at an admission price of 40¢ or more should not thereafter be double billed in the same city. The letter also included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢.

13. Prior to the 1934-1935 season, the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢. There is no evidence that these contract provisions were uniform or were adopted as a result of any agreement among the distributor defendants or any [fol. 6] agreement between any of them and any of their licensees. The price restriction proposed by defendant O'Donnell represented an increase of at least 66% in the

minimum admission price and it also contemplated that the distributor defendants agree to require that subsequent run exhibitors charge the requested minimum-admission price. Upon these facts, and upon direct evidence to this effect, I find that the price restrictions proposed by defendant O'Donnell constituted a novel and important departure from prior practice.

14. The printed license agreement used by Vitagraph since the beginning of the 1933-1934 season has contained a provision prohibiting double billing. The regular printed forms of contract used by Metro and RKO throughout the United States for the 1934-1935 and subsequent seasons include an agreement by the licensee not to double bill, but the date of the adoption of these contract forms is not disclosed by the record. Each distributor defendant thus restricting double billing was free to abandon the restriction at any time or to waive it in particular cases, whereas defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a restriction. Upon these and other facts appearing of record, I find that the proposed restriction upon double billing constituted a novel and important departure from prior practice.

15. The branch managers, upon receipt of the letters referred to in paragraph 12, notified their home offices. The branch managers themselves had no authority to agree to the proposed restrictions and in the negotiations which followed with representatives of Interstate with reference to contracts for the 1934-1935 season each distributor defendant was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas. Four of the eight branch managers could find in their files no correspondence whatever relating to the letters from defendant O'Donnell. Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence. In each of [fol. 7] the other three instances hostility to or criticism of the proposed restrictions was expressed. In one instance the branch manager wrote that "a policy of this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money." A letter of a representative of another distributor defendant stated: "They are automatically trying to set up a model arrangement for the United States without giving us anything to

say about it." A letter from a representative of a third distributor defendant advised that defendant O'Donnell was "making some unfair demands" and imposing conditions "of which he is a flagrant violator."

16. During the summer of 1934 defendants Hoblitzelle and O'Donnell, representing Interstate, conferred at various times with the representatives of each distributor defendant. In the course of these conferences all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more and there were five cities, Austin, Dallas, Fort Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions only in four of these cities, Dallas, Fort Worth, Houston and San Antonio. Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run theatres in Austin in the 1934-1935 season, but in the two following seasons it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio.

17. Metro and Paramount incorporated the agreement to impose restrictions in their written contracts with Interstate for the 1934-1935 season. The other distributor defendants carried out the agreement without embodying it in their written licensing contracts with Interstate for the [fol. 8] 1934-1935 season. The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same.

18. None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction

as to admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934.

It is agreed, however, that no demands were made in behalf of the defendant, Texas, Consolidated, upon the distributor defendants for the imposition of said restrictions for the seasons 1935-1936 and 1936-1937.

19. The president of an organization composed of and representing independent exhibitors in Texas, after learning of the restrictions, called a meeting of the exhibitors affected, and a committee was appointed to endeavor to persuade defendant Hoblitzelle to waive the proposed restrictions. The committee was given a hearing but met with no success. Defendant O'Donnell, who was aware of the hostility of the independent exhibitors to the restrictions, asked for and was given an opportunity to address a convention of their organization. Upon these facts and other evidence appearing of record, I find that the restrictions were strongly opposed by "independent" exhibitors, that is, those who are not affiliated with any distributor defendant.

20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform [fol. 9] to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally. The record is likewise clear that the more nearly unanimous the action of the distributor defendants in imposing restrictions, the greater the benefit that would be derived by Interstate.

21. The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials. From defendants' failure to summon any of these officials as witnesses, I find that the testimony which they would have given, if called to testify, would have been unfavorable to the defendants on this issue.

22. From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

IV. The Effect of the Conspiracy

23. Prior to the 1934-1935 season most of the independently operated subsequent run theatres in Texas charged an admission price of 15¢ or 20¢ and it was also customary to double bill, either on certain days in the week or as occasion required. The restrictions imposed by the distributor defendants upon subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio caused some of said exhibitors, in order to be able to obtain pictures subject to the restrictions, to increase their admission price to 25¢, either generally or when pictures subject to the restrictions were [fol. 10] shown, and have prevented these exhibitors from double billing any of such pictures. Practically all of the exhibitors who have so increased their admission price would not have done so but for the restrictions imposed by the distributor defendants. The restrictions imposed by the distributor defendants have caused other subsequent run exhibitors who were unable or unwilling to accept the restrictions to be deprived of the opportunity to exhibit any

of the pictures subject to the restrictions, the best and most popular of all new feature pictures. The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry.

24. The restrictions imposed by the distributor defendants have increased the income of Interstate by attracting to its first run theatres charging an admission price of 40¢ or more patrons who, if the pictures shown at such theatres were later exhibited in the same city at a theatre charging an admission price of less than 25¢ or as part of a double feature program, would view these pictures at such other theatres. The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors and there is no evidence that such loss in income has been offset by the higher scale in admission prices which, because of the restrictions, some of the subsequent run theatres have adopted. Since the license fees which the distributor defendants charge Interstate for exhibiting feature pictures in its first run theatres are generally based upon a percentage of Interstate's receipts from these pictures, the increased income which Interstate has received because of the restrictions has also increased the income of the distributor defendants.

Conclusions of Law

1. The court has jurisdiction of this cause under the provisions of the act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

2. All of the distributor defendants by acting pursuant to a common plan and understanding in imposing the re-[fol. 11] strictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-35 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle, and O'Donnell, and with each other.

3. All of the distributor defendants, (with the exception of Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing

Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-35 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

4. Said combination and conspiracy among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and between the distributor defendants and subsequent run exhibitors.

5. Said combination and conspiracy effected an unreasonable restraint of interstate commerce in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures (1) to impose upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and (2) not to enter into exhibition contracts with, that is, to boycott, any of these exhibitors unable or unwilling to accept such contract provisions.

6. The restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or [fol. 12] immunities conferred by the copyright law.

Apart from the combination and conspiracy referred to in paragraphs 2 to 6 inclusive of these conclusions I reach the following conclusions regarding certain provisions of each of the various license agreements involved:

7. Said provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

8. The provisions against double featuring appearing in the license agreements between all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

9. Such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

10. Such provisions as bind any or all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

[fol. 13] 11. Each and every agreement, whether oral or written, between all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the distributor defendants agree to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

12. Each and every agreement, whether oral or written, between all of the distributor defendants, (except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the said distributor defendants agree to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

I have reached the foregoing conclusions regarding said provisions of said license agreements on the ground, among others, that such undue and unreasonable restraint of interstate commerce is not within any privileges or immunities conferred upon the distributor defendants by the copyright law since the restraint was the product, not solely of the exercise of each defendant distributor's copyright privileges, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate licenses to exhibit certain feature pictures after Interstate's license privilege to exhibit these pictures had expired.

13. The petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, [fol. 14] Fort Worth and San Antonio.

14. The petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas,) binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

15. That the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar

combination and conspiracy having similar purposes and objects.

— — —, United States District Judge.

[fol. 15] IN UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF GOVERNMENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 11, 1938

Statement

This case is back in this court for the purpose of making special findings of fact and conclusions of law, as directed by the order of the Supreme Court dated April 25, 1938.

The respective parties have each submitted proposed findings of fact and conclusions of law which, while they do not differ greatly in many minor details, do vary sharply in the ultimate decision their adoption by this Court would necessitate.

There are one important issue of fact and one serious question of law involved in this case. That issue of fact is: Was there a combination or agreement between the distributor defendants to impose the restrictions demanded by the exhibitor defendants?

This Court recognized the importance of this issue, for in the opinion it was said:

"The sharp issue—the battleground—of this case is whether the respondents conspired together to bring about the fixing of the minimum 25¢ charge by the subsequent exhibitor and the destruction of the practice of double featuring."

The defendants likewise recognized the importance of this issue, for in their main brief in the Supreme Court, they said, pp. 35-36:

[fol. 16] "Of course, the protection of the Copyright Act does not extend to unreasonable restraints of trade imposed pursuant to a combination, agreement or conspiracy between two or more copyright owners who have combined for the purpose of monopoly or restraint of trade. *Strauss v. American Publishers Association*, 231 US 222. *Paramount-*

Famous Corporation v. U. S., 282 US 30. Vitagraph, Inc. vs. Perelman, unreported, January 16, 1936. (C. C. A. 3.)"

A study of the briefs of the parties hereto in the Supreme Court leads to the conclusion that one of the real reasons for the action of the Supreme Court in sending this case back for findings of fact and conclusions of law is the confusion that was created in the minds of the reviewing court about what this Court actually held on this important question of combination and agreement between the distributor defendants. For example, the defendants said in their main brief in the Supreme Court, p. 45:

"There are, however, some ambiguous expressions in the written opinion of the Court upon which it may be urged by the government that the Court was of the opinion that there was concert of action between the distributor defendants."

Again it was said (Appellants' Main Brief, pp. 26-27):

"Decision, therefore, rested upon the court's conclusion that distributors must not in their non-exclusive license agreements with exhibitors contract away their right to contract completely and fully with other exhibitors if they contract at all. By this the court meant that a single distributor could not contract with Interstate Circuit to impose the restrictions involved. The decree, as we have already shown, was drawn and entered precisely upon this theory. Neither the decree nor the complaint comprehended any conspiracy or agreement between the distributors prior to the execution of individual contracts with the first run exhibitor. Not only is there no support in the pleadings, the opinion, the decree or the evidence upon which an assertion of such a prior agreement and conspiracy can be supported, but all the testimony is to the contrary."

And in their reply brief (Appellants' Reply Brief, p. 3), this language is found:

"Thus it appears that the decree rests not upon any findings of any prior combination, conspiracy or agreement between the distributor defendants, either to agree with Interstate Circuit to impose the restrictions upon subsequent run licensees or to impose them regardless of agree-

ment with Interstate Circuit. On the contrary, the decree [fol. 17] proceeds upon the erroneous conclusion of law that the distributor defendants, by executing their agreements with the Interstate Circuit, joined in an unlawful conspiracy in violation of the Sherman Act, that these agreements were *per se* illegal, and that their performance should be enjoined."

Now, of course, this Court did decide this most important issue of fact, and did it in such language that it is difficult to see how the foregoing statements quoted from appellants' briefs could be seriously made. This Court said, speaking of the agreement between the distributor defendants,

"The conviction is inescapable that there was such an agreement."

Government's Proposed Findings and Conclusions

Having in mind the recognized principle that equity rule 70½ contemplates findings of fact and conclusions of law upon which the decision of the lower court rests and does not require the inclusion of immaterial facts or unnecessary conclusions, the findings proposed by the government have gone into as much detail as is believed consistent with good pleading, in showing the factual background for this Court's decision upon this most important question of conspiracy. Such findings on this issue are Paragraphs XII to XXII, inclusive.

Paragraphs I to VI, inclusive, merely give definitions of terms used throughout the case.

Paragraphs VII to XI, inclusive, describe the various defendants and the business carried on by each.

The remaining paragraphs, numbered XXIII and XXIV, deal with the effects of the conspiracy, which, of course, is an important issue in this case.

Every finding of fact proposed by the government, with the exception of the first portion of Paragraph XX and Paragraph XXI, is based upon evidence contained in the record in this case. The first portion of Paragraph XX and Paragraph XXI are based upon interferences irresistibly to be drawn from the evidence in this case.

As stated, there is one important issue of fact in this case and one important question of law. We have discussed the

[fol. 18] issue of fact and now refer to the question of law, which is:

Are the agreements of the various distributors with Interstate Circuit to impose these restrictions upon subsequent run competitors of Interstate in and of themselves contrary to the antitrust laws, regardless of whether or not a conspiracy existed?

This Court answered this question in no uncertain terms when it said in its opinion:

“Beyond even the citing of testimony is the irrefutable further fact that such contracts as the exhibitor respondents made with each of the distributor respondents was itself in violation of the Sherman antitrust law.”

Doubtless this question can only be finally answered by the Supreme Court, but in view of its importance, Paragraphs VII to XII, inclusive, of the government's proposed conclusions of law deal with it.

Paragraphs XI to VI, inclusive, recite the conclusions of law necessarily flowing from the findings regarding the existence of a combination and agreement among the distributor defendants. The remaining conclusions proposed by the government, viz., Paragraphs XIII, XIV and XV, merely suggest the relief to which the prevailing party is entitled.

Defendants' Proposed Findings of Fact and Conclusions of Law

Without going into unnecessary detail, we will refer to paragraphs in the findings proposed by the defendants to which serious objection is made by the government and state the grounds for such objections.

Paragraphs VIII and IX contain subject matter absolutely immaterial to the decision of this case. The question of availability was not in issue here.

Paragraph X is merely repetitious of Paragraph IV.

Paragraphs XXI and XXII likewise contain subject matter immaterial to the decision of this case. What the exhibitor defendants were advised by their attorney, or what their intentions were in demanding the imposition of these [fol. 19] restrictions, have nothing to do with the real issue in anti-trust cases, as it has often been defined by the Supreme Court. That issue is: What was the effect of what

the defendants did, so far as the antitrust laws are concerned?

Paragraph XXIII summarizes all the evidence regarding the negotiations between Interstate Circuit and each distributor which resulted in the general imposition of these restrictions. Of course, this procedure was never contemplated by equity rule 70½, and the inclusion of this paragraph, as well as paragraph XXXII, which analyzes the evidence of the subsequent run exhibitors, would doubtless provoke censure by the appellate court. These matters are all in the record and can be argued by the defendants upon their next appeal.

The rule contemplates findings on ultimate and material facts, not detailed recitals of evidence already in the record. As Judge Mack said, in *Kelly v. Central Hanover Bank and Trust Company et al*, 14 F. Sup. 346, at 347,

“I am, however, clear that under equity rule 70½ (28 U. S. C. A. following Sec. 723), the district judge is not required, at least without request or direction of the appellate tribunal to make findings of fact or conclusions of law on all the questions presented by the evidence, *but only on such of them as he deems essential to support the decree.*” (Italics supplied.)

The government objects to the following language in Paragraph XXIV:

“Each distributor acted independently of every other company, and that no communication, conference or discussion was had with any other distributor as to the restrictions, or either of them.”

This is a glaring example of the unfair findings requested by the defendants. The Court found that the local representatives of the distributors had no power to bind their respective companies, and yet we find this paragraph, starting,

“that several local representatives of the distributors testified,”

and ending with the conclusion,

[fol. 20] “that each distributor acted independently of every other company.”

The inclusion of such a finding would nullify everything that this Court had previously decided as to the existence of a combination and agreement among the distributors.

Paragraph XXIX is not borne out by the record. All the testimony in this case is to the effect that these restrictions were suggested and imposed for the benefit of Interstate Circuit, and that but for its demand, they never would have been imposed by the distributors. The benefits accruing from these restrictions to the distributors were purely incidental.

Paragraphs XXXV and XL are contrary to the facts, and if adopted might necessitate a reversal of this case. It is only necessary to look at O'Donnell's letter of April 25, 1934, to see how utterly unfounded Paragraph XL is.

Certain unnumbered findings have likewise been proposed by the defendants. All of these are objected to. For example, in the one dealing with the committee of independent subsequent run exhibitors which called on Hoblitzelle in an effort to have these restrictions waived, an attempt is made to capitalize on the testimony of one member of this committee (Tidball). Only that portion of his testimony favorable to the defendants' position is referred to. Counsel has entirely omitted Mr. Tidball's testimony, as follows:

"I am not in favor of them." (Speaking of these restrictions). "I just don't think it is a healthy condition."

This omission illustrates the danger of attempting to quote testimony or to analyze it in findings of fact. The record will be before the reviewing court, and it includes all the testimony. The remaining unnumbered proposed findings of fact likewise attempt to vitiate this Court's finding as to a combination and agreement between the distributor defendants. From the entire record in this case, it is obvious that none of these distributors would have dared to impose these new, unusual and extremely unpopular restrictions without knowing that each of his fellow [fol. 21] distributors was about to do likewise.

The two conclusions of law proposed by the defendants would, of course, require a different decision of this case than that already made by this Court. We do not assume that this Court has any intention of reversing itself, nor do we believe that there is any serious danger that the Supreme Court may do so.

Conclusion

Naturally the defendants in this case desire to present findings of fact and conclusions of law to the reviewing court which will cast the most favorable light upon their position. It is submitted, however, that their zeal in this regard has caused them to propose findings of fact and conclusions of law that would almost automatically call for the reversal of a decision reached after a fair trial and after mature deliberation by the trial court.

On the other hand, the adoption by this court of the findings and conclusions proposed by the government will give the reviewing court an accurate picture of the foundations upon which this Court's decision rests, and present that picture without in anywise jeopardizing the rights on appeal which the defendants now have and always have had.

Respectfully submitted, Berkeley W. Henderson,
Special Assistant to the Attorney General.

BWH: MJP.

[fol. 22] IN UNITED STATES DISTRICT COURT

Defendants' Requested Findings of Fact and Conclusions of Law, and Reasons Therefor—Filed June 7, 1938

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the Honorable Judge of Said Court:

Each of the defendants herein requests the court to find as a part of the Findings of Fact each of the facts enumerated in the suggested Findings of Fact and Conclusions of Law hereto attached. Each suggested finding of fact is a separate request for the finding of that fact. The respective Findings of Fact are numbered successively and appear in the same document as a matter of convenience to court and counsel, but each defendant requests each of these findings separately.

On the margin of the respective findings attached hereto appears a notation indicating whether the Government has filed objection to the finding and if so, the nature of the objection. This is for the convenience of the court in considering the findings suggested by the defendants. After each finding there is a reference to a page of the printed

record in the United States Supreme Court, a copy of which is being furnished to the trial court for use in considering the findings requested in this case.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Defendants.

[fol. 23]

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1

(*No objection.*) The facts recited in the agreed statement of facts are found as therein recited, and the agreed statement of facts is hereby adopted as part of the findings of fact.

2

(*No objection.*) A feature picture is a film of five reels or more; and a reel is 1000 feet in length.

(*No objection.*) A "first run" is the first exhibition of a picture in a given locality; a "subsequent run" is a subsequent exhibition of the same picture in the same locality. A Class "A" picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio first run at a lower floor night adult admission price of 40¢ or more. Class "B" and "C" pictures are those shown in those cities at first run at a lower floor night adult admission price of less than 40¢. Class "A" pictures as here designated do not refer to pictures that have been classified by the moving picture distributors as the best pictures, but are the pictures of the respective distributors selected by agreement with Interstate Circuit, Inc., as pictures to be exhibited in first run theatres in the four cities above named at an admission price of 40¢ or more.

Double featuring or double billing is the showing of two feature pictures on the same program at the same admission [fol. 24] price. 40¢ admission price means night adult lower floor 40¢ admission price; 25¢ admission price means 25¢ night adult lower floor admission price.

Clearance or availability is the difference in time of exhibition between first run and subsequent runs or between

various subsequent runs as provided in the license agreements between a distributor and its several licensees.

Day and date means the right given by a distributor to two or more licensees to exhibit the same picture at the same time in the same locality.

3

(*No objection.*) As shown by the agreed statement of facts, at the time of the filing of this suit on December 16, 1936, Interstate Circuit, Inc., was a first run exhibitor in the cities of Dallas, Forth Worth, Houston, San Antonio, Austin and Galveston, Texas, and a subsequent run exhibitor in each of said cities except Galveston. The first and subsequent run theatres operated by Interstate Circuit, Inc., and the opposition theatres in the four cities of Dallas, Fort Worth, Houston and San Antonio were as follows:

	Interstate Circuit First run theatres	Interstate Circuit Subsequent run theatres	Opposition Subsequent run theatres
Dallas	5	6	21
Forth Worth	3	3	11
Houston	4	5	9
San Antonio	4	6	8

There are no other exclusively first run theatres in said four cities except one in Houston operated by Loew, Inc. (S. F. Par. 7, R. 20, 53, 58 & 80.)

4

(*No objection.*) The agreed statement of facts, as well as all of the testimony, shows that a cheap second run or subsequent run exhibition of a Class A picture destroys the earning capacity of the first run exhibitor and reduces the return to the film producer. (Trial Court's Opin. R. 236.)

5

(*No objection.*) The license fees paid to the distributor defendants by Interstate Circuit, Inc., as first run exhibitor were based upon a percentage of the gross receipts of first run exhibition in most instances, and where the agreement between Interstate Circuit, Inc., and a particular distributor was on a flat rental basis, the flat rental was arrived at by

Matter in italics are marginal notations in copy.

[fol. 25] an approximation of the gross receipts for the previous season. (R. 168.)

6

(*No objection.*) The distributors in their license agreements with Interstate Circuit, Inc., required a certain number of Class A pictures to be exhibited first run by Interstate Circuit, Inc., at an admission price of 40¢ or more, and if Interstate Circuit, Inc., showed such pictures at a lesser price, it was required to pay the distributor's percentage of the difference. (R. 168.)

7

(*No objection.*) The first run exhibitor spends approximately \$1000 per picture in advertising, which redounds to the benefit of the subsequent run theatre owner. The subsequent run theatre owner exhibits in his theatre identically the same photoplay previously exhibited in the first run theatre and spends practically nothing for advertising. (R. 162-163.)

8

(*No objection except it is not material.*) The first run exhibitor, because of the difference in admission prices between first run and subsequent run, must have the picture in advance of its showing at a competing theatre and protection against its exhibition in the same locality for a certain time after its first showing in his theatre. This difference in time between first run exhibition and subsequent run exhibition is the availability for which the distributor receives compensation in license fees paid by the first run exhibitor. (R. 196-197.)

9

(*No objection except it is not material.*) In subsequent run exhibitions where the admission price, for example, in Dallas for twenty-seven theatres is 25¢, it is impossible and impracticable for the same picture to be shown in each theatre at the same time. The average number of prints supplied by the distributor defendants is approximately ten. The cost of these prints, black and white, is approximately \$200 each, and colored approximately \$800 each. The cost of print exceeds many times the film rental paid by sub-

sequent run. From the standpoint of the exhibitor the showing day and date of the same picture in all 25¢ theatres is impracticable, because patrons who cannot see the picture on the one date shown can never see it. As a result, some of the subsequent runs at the same admission price exhibit prior to others. The exhibitor obtaining the prior exhibition right pays the higher rental. Interstate Circuit's subsequent run [fol. 26] rental per picture on Class A pictures was four or five times the average rental per picture of all subsequent run exhibitors. (R. 186-7, 197-8.)

10

(No objection except it is repetition.) The owner of a first run theatre who pays high license fees advertises at great expense and charges an admission price of 40¢ or more cannot successfully maintain his first run theatre if the distributor permits a subsequent run theatre in the same locality to exhibit the same picture at a subsequent date at an admission price of less than 25¢, or as a part of a double feature program. (R. 161-66.)

11

(No objection.) Prior to the season of 1934-1935 there had been admission price restrictions in exhibition contracts. The usual minimum restriction at that time was 15¢ adult lower floor. In some instances it was 20¢, 25¢ and 10¢. (R. 193.)

12

(No objection.) In 1934 Interstate Circuit acquired in receivership proceedings in the Federal Court all the exclusively first run theatres in Dallas, San Antonio and Fort Worth, and all the exclusively first run theatres in Houston and Austin except one in each of said cities, and also a number of subsequent run theatres in these cities. At that time there were no other theatres in any of said cities of sufficient capacity and equipment to operate as exclusively first run theatres, except one in Houston. These first run theatres of Interstate Circuit in these cities are the finest theatres in the State, with the most modern and efficient equipment and every convenience. Their individual seating capacity far exceeds that of any other theatre in the State. (S. F. Par. 20, R. 79-80, 183-4, 188-9.)

13

(*No objection.*) In April, 1934, the cost of operation of theatres and cost of production of Class A feature pictures had been steadily increasing. The cost of feature pictures distributed by the distributor defendants ranged from \$150,000 to \$2,500,000. While these costs were increasing, the first run revenue had been constantly decreasing. (R. 161, S. F. Par. 16, R. 79.)

14

(*No objection.*) Interstate Circuit, Inc., was the largest customer of each of the distributor defendants. The license fees paid by Interstate Circuit, Inc., to the distributor defendants in Dallas, Fort Worth, Houston and San Antonio for the season of 1934-1935 was approximately four times larger than the amount of license fees paid by all other exhibitors in said cities. (S. F. Par. 5 & 6, R. 52.)

[fol. 27]

15

(*No objection.*) In 1934 a total of 480 feature pictures was released for exhibition, 361 by the distributor defendants and 119 by other distributors. Of this total 179 in Dallas, 158 in Fort Worth, 178 in San Antonio, and 92 in Houston were Class A pictures. (S. F. Par. 2 & 3, R. 49-52.)

16

(*No objection.*) In the spring of 1934 cheap subsequent run price admissions and double featuring of Class A pictures were damaging Interstate Circuit's first run earning capacity. At the same time it was being met with demands for increased rentals from the distributors because of their greatly increased cost of production. (Opinion, R. 236, Evidence, R. 161-66.)

17

(*No objection.*) Under these circumstances, defendant O'Donnell on April 25, 1934, wrote each distributor the letter set out in the agreed statement of facts. (S. F. Par. 10.)

18

(*No objection.*) In June, 1934, Hoblitzelle and O'Donnell discussed the price restriction with Mr. George Schaefer,

Matter in italics are marginal notations in copy.

an official of Paramount Pictures Distributing Company, the owner of an interest in Interstate Circuit. The discussion was as to Paramount's granting the restrictions. Hoblitzelle, O'Donnell and Schaefer were the only persons present. There was no discussion of the restrictions at the convention. (R. 173, 300.)

19

(*No objection.*) On July 11, 1934, O'Donnell wrote the local representatives of each of the distributor defendants the letter set out in the agreed statement of facts. (S. F. Par. 11.)

20

(*No objection.*) Each of the above letters was received by each distributor defendant.

21

(*No objection except it is not material.*) Prior to the writing of the letter of April 25, 1934, Interstate Circuit consulted its attorney and was advised that under the Copyright Law it, as licensee of a copyrighted motion picture photoplay, would have the right to contract with each distributor defendant as licensor for the exclusive right to show photoplays in certain cities and had the letter right to contract with such licensor that a photoplay shown by Interstate Circuit at a stipulated admission price should not be subsequently shown in the same city at a price less than that agreed upon between Interstate Circuit and such distributor. (R. 163.)

22

(*No objection except intent is not material.*) The 25c price restriction and the provision against double featuring were requested by Interstate Circuit because its managing officers regarded them important for the prosperity of [fol. 28] its business and not for the purpose or with the intent of injuring others. (R. 161-65).

23

(*No objection.*) The negotiations between the respective distributor defendants and Interstate Circuit, Inc., were conducted by Hoblitzelle and O'Donnell on behalf of Inter-

state Circuit and a local representative and a New York representative of each distributor. No one was present at any negotiation with any distributor except the representative of that distributor and the representative of Interstate Circuit. (R. 181.)

(No objection except not proper to give details.) The first negotiation was with Mr. Dugger, Branch Manager of Paramount, about April 28, 1934. Dugger agreed that he thought it was a correct move and that it was justified. In June, 1934, Hoblitzelle and O'Donnell discussed the price restriction with George Schaefer of Paramount at Los Angeles. About the middle of June, 1934, Mr. Unger, Southern District Manager of Paramount, came to Dallas and had two or three conversations with Hoblitzelle and O'Donnell, and Hoblitzelle and O'Donnell finally convinced Mr. Unger that the restriction was a move for the good of Paramount, for Interstate theatres, and for the subsequent run theatres, and Paramount agreed at that time to go along on that basis. Hoblitzelle and O'Donnell gave to Mr. Unger their reasons at great length as to why the restrictions would be advantageous both for the distributor and the exhibitor. Paramount was demanding increased rentals from Interstate Circuit for the season 1934-1935. Hoblitzelle and O'Donnell stated to Unger that Interstate Circuit was having considerable difficulty in operating under the present terms, and before it could consider a 40% increase in terms it would have to have some definite understanding in reference to the restrictions. Mr. Unger and Mr. Dugger stated that their company must have increased rentals, that pictures that had previously cost \$600,000 were costing \$1,000,000 to \$2,000,000. They had to get an increased return on these pictures. (R. 175-6.)

(No objection except as to details.) The next negotiation was with Vitagraph, Inc., in the early part of July, 1934, with Fred Jack, Southern District Manager of Vitagraph, with [fol. 29] headquarters in Dallas. This company already had a definite rule against double featuring. Interstate Circuit had done some double featuring prior to that time on account of double featuring by competitors, and Vitagraph had protested this double featuring. Hoblitzelle and O'Donnell fully presented their reasons for the restrictions to Mr. Jack on several occasions, and eventually Mr. Jack and Mr. Les-

serman, assistant to Mr. Sears, General Sales Manager, discussed the price restriction for a period of two days. Lesser-man and Jack returned for another conference and advised that they had discussed the matter with Mr. Sears, the General Sales Manager, and agreed that Vitagraph would go along. (R. 177.)

(*No objection except as to details.*) The next negotiation was with Mr. Connors of New York, Eastern and Southern Sales Manager for Metro, on his annual trip to Dallas. He was accompanied by Mr. Kessnich, of Atlanta, Southern Sales Manager. Mr. Connors stated that he thought the purpose was worth while, but wanted to know if Interstate Circuit would subscribe to the restrictions one hundred percent in its theatres. Hoblitzelle and O'Donnell assured them that it would. He stated that he had complained to Interstate about double billing because Metro was consistently against it. Mr. Connors after fully discussing the matter with Hoblitzelle and O'Donnell agreed to the price restriction and made it a part of the written contract set in the agreed statement of facts. All of Metro's pictures were licensed on a percentage basis. (R. 177-78.)

(*No objection except as to details.*) The next negotiation was with Fox. Hoblitzelle and O'Donnell discussed the restrictions with Mr. Hilgers, the Branch Manager, and Mr. Ballance of Atlanta, Georgia, who handles the South for Fox. Fox was asking a considerable increase in license fees. Hoblitzelle and O'Donnell called Ballance's attention to the fact that on a certain Will Rogers picture distributed by Fox, which produced one of the outstanding gross receipts at Interstate Circuit's first run exhibition and returned to Fox the largest film rental, was a short time thereafter exhibited in a downtown theatre with an announcer stating, "This is the only theatre in Texas where you can see Will Rogers for a dime." At three meetings between July and the end of September, 1934, O'Donnell and Hoblitzelle urged that such conditions were tearing down the first run rentals, making it impossible for Interstate Circuit to consider increased rentals. After Mr. Ballance discussed the matter on several occasions with his New York office and after these three meetings with Mr. Ballance, Fox on October 1, 1934, agreed to the restrictions. (R. 178-9.)

(*No objection except as to details.*) The next negotiation with Universal. The negotiation was with Olsmith of Dallas and Harry Graham, who represented the company in the South. Graham made at least ten trips to Dallas between July and November, attempting to work out the Universal contract with Interstate Circuit. The various reasons as to why the restrictions should be granted to Interstate Circuit were presented to Mr. Graham. Mr. Graham advised that Universal had had a very small number of pictures committed for exhibition in Class A theatres at 40¢ or more and that unless his company could get a larger number of Class A pictures, his company did not want to agree to the restrictions. Hoblitzelle and O'Donnell agreed with Graham and Olsmith upon eight Class A pictures, and that if the company made more fine pictures Interstate Circuit would be glad to play them in the 40¢ admission price theatres. Because of this it took a longer time to induce Universal to agree to the restrictions. The reason Mr. Graham wanted to increase his company's commitment on Class A pictures was because the minimum film rental in the 40¢ admission price theatres was \$1500, while the minimum in the other two theatres in Dallas operated by Interstate Circuit first run, the Melba and the Old Mill Theatres, was \$150 in one and \$300 or \$400 in the other. Universal was likewise demanding of Interstate Circuit increased license fees on film rentals. (R. 179.)

(*No objection except as to details.*) The next negotiation was with United Artists. Harry Gold, the Southern Sales Manager for United Artists, accompanied by Doak Roberts, the local Branch Manager, came to the office of Interstate Circuit with one of the letters in his hand and said, "Bob, this is what you are asking us to do. You are wrong. We are asking you to do it. That is exactly United Artists' sales policy. We are not going to have the very fine highly specialized pictures United Artists makes double billed at cheap prices, and we are certainly going to demand high film rentals and a greater admission price so we can participate to a greater extent." Gold pointed out that their General [fol. 31] Sales Manager, Mr. Lightman, was then in a controversy in Kansas City protesting the 20¢ admission price in that city. Mr. Gold heartily subscribed to the restrictions. (R. 180.)

(*No objection except as to details.*) The next negotiation was with RKO. These negotiations covered a period of several months. At the start of the negotiations Hoblitzelle and O'Donnell explained fully their position to Hubert MacIntyre, Southern representative, and Cress Smith, of their New York office. While they did not agree or disagree on the price restriction, the great discussion was on terms. On the last visit Mr. Smith made to Dallas he and MacIntyre agreed on the price restriction. About the 10th of October O'Donnell went to New York and agreed with Jules Levy, the General Sales Manager on the terms of the license agreement. Levy notified MacIntyre, and sometime between the 10th of October, 1934, and the 1st of November, 1934, O'Donnell returned to Dallas and completed the RKO license agreement with MacIntyre. The terms discussed between O'Donnell and Levy in New York did not include these restrictions. (R. 180.)

(*No objection except as to details.*) The next negotiation was with Columbia. O'Donnell and Hoblitzelle discussed the restrictions with Jack Underwood, Branch Manager, from the middle of July to the middle of October. Underwood's concern was greatly the same as Universal's, the minimum number of Class A pictures committed. Finally O'Donnell agreed on eight Columbia Class A pictures with the promise that if Columbia produced more Class A pictures, Interstate Circuit would play them at an admission price of 40¢. During this time Underwood was in touch with Moscow, the Southern representative, and his New York office. Moscow came to Dallas and in company with Jack Underwood, Branch Manager, agreed with Interstate Circuit upon the restrictions. (R. 181.)

(*No objection.*) Never at any time during these negotiations with the respective distributors was anyone else present except the individual representatives of the company with whom the negotiations were being had. Interstate Circuit never made any threat that it would not do business with any distributor. Each distributor was told that if it could not grant Interstate's request, Interstate could not play their pictures at an admission price of 40¢ or more; [fol. 32] that if a distributor did not agree to the restrictions, Interstate would play that company's pictures at the Melba or the Capitol or the Old Mill, where the admission

price was less than 40¢ and where the film rental would be less. (R. 181-2.)

(*No objection.*) Hoblitzelle and O'Donnell did not state to any distributor that what any other distributor did with Interstate Circuit would have any bearing on it. The whole sales policy of Interstate circuit was that these restrictions were for the good of its business and of the distributors' business. (R. 182.)

24

(*Object to language beginning "acted."*) The several local representatives of the distributors testified that in negotiating with Interstate Circuit and in making any agreements in connection with the restrictions, each distributor acted independently of every other company and that no communication, conference, or discussion was had with any other distributor as to the restrictions or either of them. (R. 200, 201, 213, 217, 152.)

25

(*No objection.*) Interstate Circuit and each of the distributor defendants in their respective answers filed in this case denied under oath the allegations in the Government's petition in reference to conspiracy, combination and agreement.

26

(*No objection.*) There was no testimony introduced showing any communication, verbally, by letter, telephone, telegraph, or otherwise between any distributor defendant and any other distributor defendant.

27

(*No objection.*) The written license agreements between Interstate Circuit, Inc., and the respective distributor defendants are fully described in paragraph 12 of the agreed statement of facts. The provisions in reference to the 25¢ price restriction and against double billing included by the respective distributor defendants in subsequent run license agreements in the cities of Dallas, Fort Worth, Houston and San Antonio are shown in Paragraph 12 of the agreed statement of facts. (R. 65, 68.)

28

(*No objection.*) Metro, RKO and Vitagraph each had in their printed license agreements throughout the United States provisions prohibiting double featuring of pictures, as shown by Paragraph 12 of the statement of facts, and United Artists had a definite policy of a minimum 25¢ [fol. 33] admission price and against double featuring.

29

(*Objection: No evidence.*) The inclusion at the instance and behest of Interstate Circuit of either or both of such restrictions in its subsequent run license agreements by any distributor was for the purpose of doing that which it regarded as a salvation for its own business. (Opinion, R. 237.)

30

(*No objection.*) The 25¢ price restriction included by Vitagraph, Inc., and RKO Distributing Corporation, as shown by the agreed statement of facts, in their respective license agreements with subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, and by Metro-Goldwyn-Mayer Distributing Corporation in its license agreements in Dallas, Fort Worth and San Antonio were included at the instance and behest of Interstate Circuit, Inc.

31

(*No objection.*) The provisions against double featuring and as to admission price shown by the agreed statement of facts to have been included in their respective subsequent run license agreements in said four cities by Paramount, Fox, Columbia, United Artists and Universal were included at the instance and behest of Interstate Circuit, Inc.

32

(*No objection.*) The effect upon subsequent run exhibitors of the inclusion of the restrictions in their license agreements, as shown by the undisputed evidence, is as follows:

Matter in italics are marginal notations in copy.

(*No objection.*) (a) During the time that restrictions were in effect, Interstate Circuit exhibited all Class A pictures in its subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio at an admission price of 25¢ on a single feature program, and the profits of such theatres increased (R. 190-1);

(*No objection.*) (b) Since the adoption of these restrictions there has been an increase in the number of theatres operated in these four large cities by Interstate Circuit, Inc., and an increase in the number of theatres operated by competitors of Interstate Circuit, Inc., in said four cities (R. 174);

(*No objection.*) (c) In these four cities where the restrictions applied there were forty-nine subsequent run exhibitors in competition with Interstate Circuit, Inc. Of this number twenty testified. Of the twenty none was put out of business, and only two failed to make a profit. One of

[fol. 34] the two who failed to make a profit did not license any of the 182 unrestricted pictures of the distributor defendants, but exhibited only pictures of other distributors, and he made a profit in one of the theatres operated by him. One operated a while, closed, and operated again after the restrictions became effective, and made a profit each month for more than a year prior to the trial. Prior to the restrictions he had failed as an exhibitor three times. (R. 115, 129.)

(d) There were four of these subsequent run theatres in which no Class A pictures were exhibited, as follows:

(*No objection.*) (1) North Side Theatre, Houston, in about the poorest neighborhood of the City, its customers being mostly railroad employees and Mexicans, with an admission price of 15¢, two admissions for 15¢ on Monday; no balcony and no matinees. After the *tr*strictions this exhibitor tried Shirley Temple pictures on Sunday at a 25¢ admission and business was poor. Tried the same picture on Monday with two admissions for 25¢, and customers said they would not pay 25¢ in a 15¢ joint. Thereafter charged 15¢ admission and exhibited pictures released by distributor defendants that were not restricted and pictures

released by other distributors, double featuring any of them when desired and has been making a profit. This exhibitor would like to get a few Class A pictures to exhibit at 15¢. Pictures like "The Life of Pasteur," and "Disraeli" could not stay in neighborhood of this theatre. (R. 110-11.)

(*No objection.*) (2) Midway Theatre at Houston; 15¢ admission, no balcony. Prior to restrictions this exhibitor failed in operation of theatres in three different locations. After the restrictions he operated for a period of five months, charging 25¢ two days a week on Class A pictures; other days, 15¢ admission for pictures not restricted. At the end of five months returned to 15¢ admission without using Class A pictures; continued for two months and closed the theatre for about six months, then opened with 15¢ admission price on unrestricted pictures and had been making a profit every month for more than a year. In his neighborhood restricted and unrestricted pictures are about on an adverage as far as drawing power is concerned. (R. 113-115, 186.)

[fol. 35] (*No objection.*) (3) Heights Theatre at Houston; 15¢ admission, with balcony. Does not show Class A pictures, but has had very successful operation showing unrestricted pictures at 15¢. Would like to show some Class A pictures at 15¢, but does not know what he would do with pictures like "Romeo and Juliet" in his theatre. (R. 121-22.)

(*No objection.*) (4) Queen Amusement Company at Fort Worth operated two theatres; the New Liberty at 1107 Main Street and the Ideal at 1408 Main Street; the New Liberty having 850 seats downstairs and 650 in balcony; the Ideal having 350 seats downstairs and 175 in the balcony. Prior to restrictions the New Liberty charged 25¢ lower floor, 15¢ in the balcony on all pictures. The Ideal charged 15¢ lower floor and 10¢ in balcony. After restrictions no change in price at the New Liberty and theatre operated at a profit. Ideal changed to 25¢ on Class A pictures, but did not do well, then returned to old prices; did not show Class A pictures and did not license any of distributors' pictures that were unrestricted. (R. 127-29.)

Matter in italics are marginal notations in copy.

(*No objection.*) A large majority of the subsequent run exhibitors in the cities where these restrictions applied had increased profits after the restrictions became effective. (R. 121, 134, 142, 150, 190, 191, 204, 207, 212.)

(*No objection.*) The distributor defendants were in active competition with each other. (R. 201.)

(*Objection: Contrary to facts.*) It was to the interest of each distributor defendant having Class A pictures for exhibition to agree with Interstate Circuit, Inc., to impose the restrictions, regardless of the action that might be taken by other distributors in acceding or declining to accede to demands of Interstate Circuit. (S. F. Par. 18 & 19, R. 79; S. F. Par. 4, R. 52, 167, 179.)

If some of the distributors had refused to grant the restrictions, those granting them would have been benefited. (Same references as above).

(*No objection.*) During the period involved in this case Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., did not operate any theatres in the same city or locality.

(*No objection.*) There were 901 moving picture theatres in the State of Texas during the period involved.

[fol. 36]

(*No objection.*) The Rio Grande Valley section of Texas consists of the following counties:

(*No objection.*) The cities in which Texas Consolidated Theatres, Inc., operated theatres in the Rio Grande Valley and their population are as follows: Brownsville, 22,000; Harlingen, 12,000; San Benito, 10,700; McAllen, 9,000; Mercedes, 6,600; Weslaco, 5,000.

The distance, between these cities are as follows:

(*No objection.*) None of the cities of El Paso, Tyler, Amarillo, Waco and Wichita Falls is located in the Rio Grande Valley.

39

(*No objection.*) The population of the six cities in which Interstate Circuit operated theatres is as follows: Dallas, 260,000; Fort Worth, 163,000; Houston, 292,000; San Antonio, 230,000; Austin, 53,000; Galveston, 51,000.

40

(*Objection: Contrary to facts.*) In the negotiations following O'Donnell's letter of July 11th between Messrs. O'Donnell and Hoblitzelle on behalf of Interstate Circuit and the representatives of the respective distributors in reference to the restrictions, no reference was made to an imposition of the restrictions in Austin or Galveston and there was no reference to Texas Consolidated. (R. 175-181.) There were no subsequent run theatres in Galveston, and no witness was called to testify that subsequent run theatres operated by competing exhibitors in Austin charged an admission price of less than 25¢. At the time Interstate Circuit entered into the agreement with each of the distributors for the season 1934-1935, its subsequent run theatre in Austin charged an admission price of 25¢ for Class A pictures. The evidence did not show any complaint from any subsequent run theatre owner in Austin.

[fol. 37] (*Objection: Contrary to evidence.*) The committee of the independent exhibitors that called to see Messrs. Hoblitzelle and O'Donnell in reference to the restrictions, called on Messrs. Hoblitzelle and O'Donnell for the reason they understood they wanted to put in force the restrictions. One of the committee testified that he operated subsequent run theatres in Fort Worth, and when he went with the committee to see Hoblitzelle and O'Donnell, he had a fear the restrictions would be damaging to his business, but that after the operation of these restrictions they had not been damaging to the business of one of his theatres, and he did not know that they had been damaging to his other theatres; that

he thought Class A pictures should be protected as to admission price and against double features. (R. 118-120.)

[fol. 38] (*Objection with no reason.*) If any distributor had refused the request of Interstate Circuit for these restrictions, the value of the pictures would have been reduced, and the total license fees of that distributor would have been reduced. (S. F., Paragraphs 18 and 19; Hoblitzelle's testimony, R., 167; O'Donnell's testimony, R., 179.)

(*Objection no reason.*) If some of the distributors had refused to grant the restrictions, each distributor that refused would have lost the difference between the license fees in the Melba and Old Mill Theatres, where there was a minimum license fee of \$150 to \$400, and the license fees of the Majestic and Palace Theatres, where there was a minimum license fee of \$1500. (R. 179.)

(*Objection no reason.*) In the Majestic and Palace Theatres one picture was played each week. The requirements for pictures for these two theatres for the year was 104. If several of the distributors had refused the request of Interstate Circuit for these restrictions, and the balance had granted them, those granting the restrictions would have received the minimum rental of \$1500 per picture for exhibition of their pictures in the Majestic and Palace Theatres, and these distributors granting the restrictions would have received license fees largely in excess of the total license fees paid by all competing subsequent run theatres, and the distributors who granted the request would have received the benefit of \$1,000 of advertising per picture spent by Interstate Circuit. The distributors refusing the request would not have got the benefit of the advertising, nor the income from the Palace and Majestic Theatres, and each of them would have suffered a great financial loss. (R. 167, 179.)

[fol. 39] Each of the defendants respectfully requests the court to adopt each of the findings of fact above suggested as a part of the findings directed by the Supreme Court to be made in this cause, in order that the Supreme Court may properly pass upon the contentions of the respective parties in this cause.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Defendants.

[fol. 40]

Conclusions of Law

1. A distributor defendant, owner of a copyrighted motion picture photoplay, acting independently of any other distributor, had the legal right to include either or both of the restrictions here in question in its subsequent run license agreements pursuant to agreement with or at the instance and behest of Interstate Circuit, Inc., and the license agreement between an individual distributor and Interstate Circuit, Inc., including either or both of said restrictions is a valid and legal contract.

2. There was no evidence to authorize a legal inference of a conspiracy, combination or agreement among the distributor defendants to include either or both of said restrictions in subsequent run license agreements.

Each of the defendants respectfully requests the court to adopt each of the conclusions of law above enumerated as its conclusions of law, and each suggested conclusion of law is requested as a separate conclusion of law.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Defendants.

[fol. 40a] IN UNITED STATES DISTRICT COURT

[Title omitted]

**Additional Findings of Fact and Conclusions of Law
Requested by Defendants**

**REQUEST FOR ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS
OF LAW**

To the Honorable Judge of Said Court:

In addition to the requested findings of fact and conclusions of law heretofore filed in this Court, each of the defendants herein requests the Court to find as part of the findings of fact and conclusions of law each of the facts enumerated in the additional requested findings of fact and conclusions of law hereto attached. Each such additional requested finding of fact is a separate request for the finding of that fact. The respective additional findings of fact are numbered successively and appear in the same document as a

matter of convenience to the Court and counsel, but each defendant requests each of these findings separately.

Thompson, Knight, Baker, Harris & Wright, Jno. R. Moroney, George S. Wright, Attorneys for Defendants.

(Copy.)

[fol. 40b]

[Title omitted]

ADDITIONAL REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Additional Findings of Fact

1. Upon receipt of the letters of April 25, 1934 and July 11, 1934 from R. J. O'Donnell, representatives of four of the distributor defendants (United Artists, Metro, Paramount and Vitagraph) expressed immediate agreement with the plan suggested in such letters, only one distributor defendant (Universal) expressed hostility to the plan and its primary concern was as to the number of its pictures which Interstate Circuit showed first run in its Class A theatres and, with respect to the three other distributor defendants (RKO, Fox and Columbia), there is no evidence, other than their eventual agreement to the plan, of the immediate reaction of their representatives thereto.

2. There is no evidence that during the negotiations between the distributor defendants and defendants Hoblitzelle and O'Donnell, the request for a price restriction in the Rio Grande Valley, which was made on behalf of Texas Consolidated in the letter of July 11, 1934, was ever mentioned.

3. There is no evidence that imposition of the price restriction in the Rio Grande Valley, requested by Texas Consolidated in the letter of July 11, 1934, was to the advantage of any distributor defendant.

[fol. 40c] 4. There is no evidence that during the negotiations between the distributor defendants (except Universal) and defendants Hoblitzelle and O'Donnell, the request for the restrictions in the City of Austin was ever mentioned.

5. There is no evidence that any subsequent run theatres in the City of Austin charged an admission price of less than 25¢.

6. The request of Interstate Circuit was for the imposition of both the price and double feature restrictions. Imposition by any distributor defendant of one of the requested restrictions without the other would not have been a compliance by it with the request of Interstate Circuit, and such noncompliance would have caused such distributor defendant a serious loss in first run revenue and would have reduced its total license fees.

7. The imposition of the restrictions by each distributor defendant, pursuant to agreement with or at the instance and behest of Interstate Circuit, had a reasonable relationship to the reward of the copyrights owned by such distributor defendant and was necessary for the protection of the profits accruing to it from the exhibition of its copyrighted films.

Additional Conclusions of Law

1. Since the first agreement between Interstate Circuit and a single distributor defendant containing the restrictive provisions was a legal contract, the mere fact that thereafter at different times each of the distributors, acting independently of each other, entered into similar agreements with Interstate Circuit does not constitute an agreement, combination or conspiracy in violation of the Sherman Anti-Trust Law.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright.

(Copy.)

[fol. 41] IN UNITED STATES DISTRICT COURT

MEMORANDUM IN SUPPORT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW REQUESTED BY DEFENDANTS—Filed June 7, 1938

In support of the findings of fact and conclusions of law requested by the defendants, we submit—

1. The agreed statement of facts, which was carefully prepared and filed, recites a great many of the facts material to the issues involved in this case. The parties have agreed that no evidence should be introduced contrary to the agreed statement of facts, and we respectfully submit

that this Court should by all means find the facts as recited in the agreed statement of facts and make the agreed statement of facts by reference a part of its findings of fact.

2. The definitions attached to the suggested findings of fact will be very helpful to the appellate court in considering the case.

3. Requested findings Nos. 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, the first and last two paragraphs of 23, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 37, 38 and 39 are not objected to by the Government, and they are supported by the undisputed evidence as shown by the citations of pages of the record following the respective suggested findings, and each is a fact material to a consideration of the questions involved in this case, and the defendants are entitled to have each of them found as a fact.

4. The only objection made by the Government to finding No. 8 suggested by the defendants is that it is not material, and yet in this case the Government has contended that one [fol. 42] of the reasons for the unreasonableness of these provisions is the difference in time between the exhibition of the pictures. The legality of availability is not involved, but it is material to the facts in this case that the difference in time between first and subsequent runs, and the difference in time between subsequent runs at the same admission price is a matter of contract for which the exhibitor having the advantage in time pays the distributor. Under these circumstances this finding should be made by the Court.

5. The only objection the Government makes to suggested finding No. 9 is that it is not material. This is a material finding supported by the undisputed evidence, as shown by the page reference following it. The Government has taken the position in this case that one of the reasons these restrictions are unreasonable is that Interstate Circuit showed in its 25¢ theatres pictures prior in point of time to the showing of the same pictures in other theatres at the same admission price. Suggested finding No. 9 gives a valid reason for this difference in time.

6. The only objection the Government makes to suggested finding No. 21 is that the advice of counsel to Mr. Hoblit-

zelle before he requested the restrictions is immaterial. In view of the fact that the Government has contended in this case that the object, purpose and intent of Mr. Hoblitzelle was to injure his competitors or drive them out of business and to create a monopoly, this undisputed fact is material and should be found by the Court.

7. The only objection made by the Government to suggested finding No. 22 is that the latter part, showing that it was not the intent or purpose of Interstate Circuit in making the request to injure others, is immaterial. In this case in the trial court and in the United States Supreme Court, the Government has taken the position that the record showed that it was the intent of Mr. Hoblitzelle and Mr. O'Donnell in requesting these restrictions to injure subsequent run exhibitors, to put them out of business, and to monopolize the moving picture business. Of course good intentions do not excuse a violation of law, but where one of the charges made is based upon unlawful purpose and intent, then the courts hold that the accused party can testify as to his intentions and that that testimony is material. [fol. 43] For some reason the Government contends here that the intention is immaterial, although when the case was submitted to the Supreme Court the Solicitor General stated to the Supreme Court that it was the purpose in requesting and enforcing these restrictions that made them illegal.

8. The only objection made by the Government to suggested finding No. 23, beginning with the second paragraph and continuing to the next to the last paragraph, in which paragraphs objected to the negotiations of Messrs. Hoblitzelle and O'Donnell with the respective distributors' representatives are summarized, is that it is not necessary or proper to give these details. As shown by the record references after each one of these paragraphs, the suggested finding is supported by the undisputed evidence, and the Government does not contend that they are not supported by the undisputed evidence. This summary of the respective negotiations is very material upon the question as to whether the various distributor defendants had made a prior agreement among themselves to include the restrictions, or either of them, in their subsequent run license agreements. The summary shows that these distributors

acted independently of each other, and shows that in the respective negotiations any restrictions for Texas Consolidated Theatres were not considered by either party, and that any restrictions for the cities of Austin and Galveston were not considered by either party. If your honor will take the time to look at the Government's brief in the Supreme Court, you will find that although the Government is contending now that these negotiations are immaterial and unimportant, in the Supreme Court the Government urged that one of the inferences to support a common understanding or agreement among the various distributors to include the restrictions requested by Texas Consolidated and granted the restrictions of Interstate Circuit, and the unanimity with which the distributors refused the restrictions at Austin and granted them in the other four cities.

This summary covers less than three pages, and we respectfully submit that this Court should include in its finding [fol. 44] this short summary of these material negotiations. These negotiations also show the purpose and intent of the parties in requesting and granting the restrictions and the action of the respective distributors.

9. Our suggested finding No. 24 is to the effect that the several local representatives of the distributors testified that in negotiating with Interstate Circuit and in making any agreement in connection with the restrictions, each distributor acted independently of every other company and that no communication, conference or discussion was had with any other distributor as to the restrictions or either of them. The Government objects to this finding and refers to it as a glaring example of unfair findings requested by the defendants, and then said:

"The Court found that the local representatives of the distributors had no power to bind their respective companies and yet we find this paragraph, starting, 'The several local representatives of the distributors testified,' and ending with the conclusion, 'that each distributor acted independently of every other company.' "

In other words, the Government accused the defendants of being unfair in requesting a finding on this undisputed evidence, because this Court held that a local branch manager had no authority to enter into a conspiracy, combination and

agreement in violation of law on behalf of his company. The fact that a local representative has no authority to bind his superior by entering into an unlawful agreement does not disqualify him from testifying to a fact. He is not disqualified as a witness because of this lack of authority when he participated in the negotiations with Interstate Circuit. The Government says further :

“The inclusion of such finding would nullify everything this Court had previously decided as to the existence of a combination, conspiracy or agreement among the distributors.”

This Court has never found a combination, conspiracy or agreement among the distributors to include the restrictions. Even if it had done so, it should not deny these defendants the right to have the findings include such an undisputed fact. In other words, the United States Government, in its effort to obtain a finding unsupported by evidence, objects to this finding, testified to without dispute, simply because the local representative of each company was without authority to enter into an unlawful agreement. This Court in its opinion (R. p. 237) indicates that the local representatives [fol. 45] of the distributors so testified, by this statement :

“The respondents O'Donnell and Hoblitzelle and the Dallas agents of the distributor respondents all strenuously contend that there was no conspiracy or agreement.”

10. The next objection made by the Government to our suggested findings is its objection to suggested finding No. 29 to the effect that the inclusion by a distributor at the instance and behest of Interstate Circuit of either or both of such restrictions in its subsequent run license agreements was for the purpose of doing that which it regarded as a salvation of its own business. The astounding objection made by the Government is that, “This is not borne out by the record,” and yet the Government points to not one line of testimony to the contrary. This suggested finding is supported by the undisputed evidence and by the opinion of this Court. (R. 237.) There was not a line of testimony introduced indicating any other purpose on the part of any distributor in inserting in its license agreements either of these restrictions. On behalf of the Government one man tries the case, another presents it to the United States

Supreme Court, and the Solicitor General of the United States solemnly states to the United States Supreme Court that one of the reasons these restrictions were illegal is that the distributors had an unlawful purpose in granting them. The Government makes the contention that this finding is not supported by the evidence, notwithstanding paragraphs 18 and 19 of the agreed statement of facts, reading as follows:

"18. The exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

"19 The exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture."

It is clear from paragraph 18 quoted above that if a distributor permitted its feature pictures to be exhibited at an admission price of less than 25¢ subsequent run, the total license fees of the distributor of such motion pictures would be reduced.

Under paragraph 19 of the agreed statement of facts, if a distributor refused the restriction against double featuring [fol. 46] and permitted its feature pictures to be double featured on subsequent runs, such double featuring would reduce the value of such motion pictures and would reduce the total license fees of the distributor of such pictures. The undisputed evidence of Mr. Hoblitzelle (R. 167) and of Mr. O'Donnell (R. 179), unimpeached by any other testimony or any inference, shows that if any distributor had refused to grant either of these restrictions, that distributor would not have been permitted to exhibit its pictures in the Palace and Majestic Theatres with a minimum rental of \$1,500, but would have been forced to exhibit his pictures in other Interstate Circuit theatres with a minimum rental of \$150 in one instance and \$400 in another. In other words, the distributor refusing either of the restrictions would have lost on each picture the difference between \$400 and \$1,500, and this difference of \$1,100 was more than the

total license fees of all competing subsequent run theatres in the City of Dallas.

Mr. Hoblitzelle's undisputed testimony further shows that at the time these restrictions were granted by the respective distributors, cheap subsequent runs were destroying the earning capacity of the first run theatres and first run license fees of the distributor. (R. —)

Mr. O'Donnell's letter of July 11th, which the Government construes erroneously in its suggested findings, clearly states:

"In the event a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for *his* product to be exhibited in our A theatres at top admission prices."

And yet, the Government, in its efforts to win the case right or wrong, says this suggested finding is not "borne out by the record."

11. The next finding suggested by us and objected to by the Government is finding No. 35, as follows:

"It was to the interest of each distributor defendant having Class A pictures for exhibition to agree with Interstate Circuit, Inc., to impose the restrictions, regardless of the action that might be taken by other distributors in acceding or declining to accede to the demands of Interstate Circuit. If some of the distributors had refused to grant the restrictions, those granting them would have benefited."

[fol. 47] The objection of the Government is that "this finding is contrary to the facts and if adopted *might necessitate a reversal of this case.*" That a finding of an undisputed fact may reverse a judgment of this Court should be of no concern to the Government, or to this Court, and we are sure it is of no concern to this Court. Unless the judgment of this Court under the law and the evidence is right, it should be reversed. There is not the slightest doubt that suggested finding No. 35 is supported by the undisputed evidence. Take, for example, the City of Dallas, in which was the largest number of competing theatres and the largest film rentals paid each distributor. Under the agreed statement of facts Interstate Circuit paid to the distributors four times as much license fees in the four large cities as were paid by all competing theatres. (S. F. Par.

5, R. 52.) The license fees paid by Interstate Circuit for first run exhibition of first class feature pictures in said four cities averages between \$1500 and \$5,000 per picture (S. F. Par. 4, R. 52.), while the license fees of the exhibition of the same pictures shown at subsequent run in the same localities average between \$20 and \$30. (S. F. Par. 4, R. 52.) According to the undisputed evidence of Messrs. Hoblitzelle and O'Donnell, pictures were exhibited in the Palace and Majestic Theatres in Dallas at a minimum rental of \$1500, and the minimum rental in the two other downtown theatres is in one instance \$150 and in the other \$400. (R. 167, 179.)

As indicated in the foregoing paragraph, beginning with the letter of July 11th and continuing through the negotiations with the respective distributors, Messrs. Hoblitzelle and O'Donnell positively stated to each distributor that if it did not grant these restrictions, it would be impossible for Interstate Circuit to exhibit that company's pictures in the Majestic and Palace Theatres with these high rentals, and that that company's pictures would be exhibited in the theatres with the minimum rentals of \$150 in one instance and \$400 in the other.

The twenty-one competing theatres in Dallas averaging \$30 per picture film rental would pay at the most a total of \$630 film rentals on any picture of any distributor. If [fol. 48] any one distributor had refused the request of Interstate Circuit for either of these restrictions, it would have deprived itself on each picture of a film rental of the minimum of the difference between \$1500 and \$400 and a maximum of the difference between \$150 and \$1500, depending upon the theatre in which the picture was exhibited. The minimum loss would have been nearly twice as much as all the total revenue from all competing subsequent run theatres in the city. The maximum loss would have been \$1350, more than twice as much as the total revenue of all subsequent run competing exhibitors; and yet the Government says that the record does not support a finding that it was to the interest of each distributor having Class A pictures for exhibition to agree with Interstate Circuit to impose the restrictions, regardless of the action that might be taken by the other distributors. Under this undisputed evidence if one, two, three or four distributors had refused to accede to the request of Interstate Circuit,

each of those distributors would have lost money and the other distributors acceding to the request for restrictions would have had the profit of their pictures being exhibited in the Palace and Majestic Theatres, where the minimum film rental was \$1500 and the average rental between \$1500 and \$5,000 per picture.

On the trial of this case before your honor, no such contention was made by the Government. When Mr. O'Donnell was on the stand, he positively testified that the distributors granting the request would be benefited and the distributors refusing the request would be damaged. (R. 194) When the case reached the United States Supreme Court, there for the first time the Government in its effort to support its claim by inference that there was a combination, conspiracy and agreement among the several distributors to include these restrictions, made this contention. Having made the contention in the Supreme Court, it now makes it here, notwithstanding the solemn agreement between the Government and these defendants, as shown by paragraphs 18 and 19 of the agreed statement of facts, that if feature pictures are exhibited subsequent run in these cities at an admission price of less than 25¢, or are double featured, the total license fees of the distributors [fol. 49] of such motion pictures will be reduced.

12. The next suggested finding of fact made by us and objected to by the Government is finding No. 40. The substance of this finding is that in the negotiations between Messrs. Hoblitzelle and O'Donnell and the respective distributors' representatives in reference to the restrictions, no reference was made to an imposition of the restrictions in Austin or Galveston, and there was no reference to Texas Consolidated Theatres. The objection is that this suggested finding is contrary to the evidence and, if adopted, might necessitate a reversal of this case. The Government then states: "It is only necessary to look at O'Donnell's letter of April 25, 1934, to see how utterly unfounded paragraph suggested finding 40 is."

There can be no dispute as to what the letter of April 25th contains, nor as to what the letter of July 11th contains. The letter of April 25th (Par. 10, S. F.) does not refer in any way to Texas Consolidated Theatres. It does refer to Austin and Galveston in the first paragraph, but in the letter of July 11th no mention is made of Austin

or Galveston, and on behalf of Interstate Circuit the letter refers to certain of Interstate Circuit cities. As Interstate Circuit had only six cities, certain of them must have meant less than six. However, in view of the statement of the Government, suggested finding 40 is limited to negotiations following O'Donnell's letter of July 11th.

Having no evidence of an agreement or understanding among the distributor defendants to include these restrictions, the Government in its brief before the Supreme Court argued that, as the evidence showed that the request had been made for the same restrictions on behalf of Texas Consolidated and Interstate Circuit, unanimity in granting the request of Interstate Circuit and refusing the request of Texas Consolidated indicated understanding or agreement among the distributors. In said brief it was also argued that, in view of the fact that Interstate Circuit requested restrictions for Austin and all the distributors granted the restrictions for the four large cities and refused them for Austin, that was evidence of an understanding or agreement among the distributors in reference to the [fol. 50] matter. The letter of July 11th shows that Texas Consolidated did not make the same request made by Interstate Circuit in that letter. The request of Interstate Circuit was that the pictures shown at 40¢ should not thereafter be shown in the same city for less than 25¢ nor double billed. The request of Texas Consolidated in the letter of July 11th shows that a picture shown in the Rio Grande Valley at 35¢ should not thereafter be shown anywhere in the Rio Grande Valley for less than 25¢,—two entirely different requests.

The requested finding of fact No. 40 shows that no request for Texas Consolidated and no request for restrictions in Austin were mentioned in the negotiations following the letter of July 11th, and in view of the Government's contention in the United States Supreme Court, this Court should make this finding.

The Government makes no objection to the last two sentences of suggested finding No. 40.

13. The next requested finding by the defendants objected to by the Government is in reference to the committee of independent subsequent run exhibitors that called on Mr. Hoblitzelle in an effort to have the restrictions waived. The Government states that only that portion of the testimony

of one of the committee favorable to defendants' position is referred to. This requested finding was for the purpose of showing that when Mr. Tidball, one of the member- of the committee, protested to Mr. Hoblitzelle, he was actuated by a fear that the restrictions would damage his business, but after the operation of the restrictions, this member of the committee found, according to his testimony, that his business was not damaged by the restrictions. During the trial of the case your honor held that it was immaterial whether a particular exhibitor was opposed to or in favor of the restrictions. The Government in its suggested findings of fact seeks to create the inference that all the subsequent run exhibitors were damaged because the committee called on Mr. Hoblitzelle.

14. The next finding suggested by defendants and objected to by the Government is the finding to the effect that [fol. 51] if any distributor refused the request of Interstate Circuit for the restrictions, the value of his pictures would have been reduced and the total license fees of that distributor would have been reduced. (S. F. Par. 18 and 19; Hoblitzelle's testimony, R. 167; O'Donnell's testimony, R. 179.) No reason is given by the Government for its objection. It objects, notwithstanding the agreed statement of facts and the undisputed evidence supports this suggested finding.

15. The next finding suggested by the defendants and objected to by the Government is to the effect that if some of the distributors refused to grant the restrictions, each distributor that refused would have lost the difference between the license fees in the Melba and Old Mill Theatres, where there was a minimum license fee of \$150 to \$400, and the license fees of the Majestic and Palace Theatres, where there was a minimum license fee of \$1500. (R. 179.) There was no reason given by the Government for objecting, notwithstanding this finding is taken from the undisputed evidence and is material to the contentions mentioned by the Supreme Court in its opinion.

16. The next finding suggested by the defendants and objected to by the Government is on page 16, giving the facts as to the results of playing pictures in the Majestic and Palace Theatres for a year by some of the distributors

granting the requested restrictions, and the effect of one or more distributors' refusing the request, and the loss of license fees, and the loss of the benefit of advertising of each picture by the first run exhibitor. No reason is given for the objection and no claim is made that the finding is not supported by the undisputed evidence.

The defendants in this case have prepared each of these suggested findings for the consideration of this Court from the undisputed evidence introduced at the trial of this case. These facts suggested to be found by this honorable Court are material to the issues of law involved in this litigation; and the defendants respectfully request this honorable Court for action upon defendants' requests in reference to [fol. 52] each of these findings, and suggest that if these suggested findings are made, the Supreme Court will be in a position to determine fairly the issues involved.

Respectfully submitted, Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright.

[fol. 53] IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed May 17, 1938

In accordance with an order from the Supreme Court and Equity Rule No. 70½, I make the following special findings of fact and conclusions of law in the above styled cause:

1. Definitions

1. A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

2. First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality. Motion picture theatres giving first run exhibitions of feature pictures distributed by the distributor defendants will be referred to herein as first run theatres and those giving subsequent run exhibitions of such feature pictures will be referred to herein as subsequent run theatres.

3. Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

4. The words "admission price" as used herein mean a lower floor night admission price for adults.

A Class A picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio at an admission price of 40¢ or more.

The restrictions as to admission price and against double features hereinafter referred to applied only to Class A pictures.

5. Certain of the corporate defendants will be referred to herein by abbreviated titles as follows:

Defendants	Titles
Interstate Circuit, Inc.	Interstate.
Texas Consolidated Theatres, Inc. ...	Texas Consolidated.
Columbia Pictures Corporation	Columbia.
Twentieth Century-Fox Film Corp'n.	Fox.
Metro - Goldwyn - Mayer Distributing Corporation	Metro.
Paramount Pictures Distributing Company, Inc.	Paramount.
[fol. 54] RKO Radio Pictures, Inc. ...	RKO.
United Artists Corporation	United Artists.
Universal Film Exchanges, Inc.	Universal.
Vitagraph, Inc.	Vitagraph.

6. The defendants Interstate, Texas Consolidated, Karl Hoblitzelle and R. J. O'Donnell will be sometime referred to herein as the exhibitor defendants and the other defendants will be sometimes referred to herein as the distributor defendants.

II. The Defendants

7. Interstate operates 43 motion picture theatres located in Austin, Dallas, Fort Worth, Galveston, Houston and San Antonio. It operates all of the first run theatres in these cities except one in Houston which is affiliated with Metro. In each of these cities it operates two or more first run theatres which regularly charge an admission price of 40¢ or more. In addition, it operates several subsequent run theatres in each of these cities. In all of these cities except Galveston there are other subsequent run theatres competing with Interstate's first run and subsequent run theatres.

8. Texas Consolidated operates 66 theatres, some of them first run and others subsequent run houses. These theatres

are located in various Texas cities other than those in which Interstate operates theatres and in Albuquerque, New Mexico. In some of these cities there are no competing theatres and in the leading cities of Abilene, Albuquerque, Amarillo, El Paso, Waco and Wichita Falls there are no competing first run theatres.

9. Defendant Karl Hoblitzelle is president and defendant R. J. O'Donnell is general manager of both Interstate and Texas Consolidated and they are in active charge and control of the business and operations of these two corporations. Interstate and Texas Consolidated are affiliated with each other and with Paramount.

10. Defendant Metro Goldwyn Mayer Distributing Corporation of Texas is a subsidiary of and acts as the Texas agent for Metro. Defendant Twentieth Century Fox Film Corporation of Texas is a subsidiary of and acts as the Texas agent for Fox. The other eight distributor defendants distribute motion picture films in interstate commerce throughout the United States. They solicit from exhibitors located in Texas applications for licenses to exhibit films; [fol. 55] forward such applications to their New York offices, where they are granted; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered and re-delivered to local exhibitors; and finally reship the films to laboratories maintained outside of Texas. They distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States.

11. All of the feature pictures distributed by the distributor defendants are copyrighted and each distributor defendant either is the copyright proprietor of each picture distributed by it or has the exclusive right to license its exhibition in the United States.

III. The Conspiracy

12. On April 25, 1934, defendant O'Donnell addressed an identical letter (Agreed Statement of Facts, Par. 10), written on Interstate's letterhead to the Texas branch manager, located at Dallas, of each distributor defendant. The letter stated that Interstate, in contracting for pictures for the coming 1934-1935 season, would insist that any picture shown first run in an Interstate theatre at an admission

price of 40¢ or more should not be exhibited at any future time in the same city at an admission price of less than 25¢. On July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with George Shaeffer, of Paramount in Los Angeles, California, sometime after April 25, 1934, O'Donnell sent a second letter (Agreed statement of facts, Par. 11), written on Interstate's letterhead, which was addressed jointly to the various Texas branch managers of the distributor defendants. In this letter he renewed and amplified his earlier demand and also demanded that any feature picture shown in a first run Interstate theatre at an admission price of 40¢ or more should not thereafter be double billed in the same city. The letter also included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢.

[fol. 56] 13. Prior to the 1934-1935 season, the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢. There is no evidence that these contract provisions were uniform or were adopted as a result of any agreement among the distributor defendants or any agreement between any of them and any of their licensees. This price restriction represented a large increase in the minimum admission price, and also contemplated that distributor defendants agree to require that subsequent run exhibitors charge the requested minimum admission price. These price restrictions was an important departure from previous practice.

14. The printed license agreement used by Vitagraph since the beginning of the 1933-1934 season has contained a provision prohibiting double billing. The regular printed forms of contract used by Metro and RKO throughout the United States for the 1934-1935 and subsequent seasons include an agreement by the licensee not to double bill, but the date of the adoption of these contract forms is not disclosed by the record. Each distributor defendant thus restricting double billing was free to abandon the restriction at any time or to waive it in particular cases, whereas defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a re-

striction. The proposed restriction upon double billing constituted a novel and important departure from prior practice.

15. The branch managers, upon receipt of the letters referred to in paragraph 12, notified their home offices. The branch managers themselves had no authority to agree to the proposed restrictions and in the negotiations which followed with representatives of Interstate with reference to contracts for the 1934-1935 season each distributor defendant was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas. Four of the eight branch managers could find in their files no correspondence whatever relating to the letters from defendant O'Donnell. Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence. In each of the other three instances hostility to or criticism of [fol. 57] the proposed restrictions was expressed. In one instance the branch manager wrote that "a policy of this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money." A letter of a representative of another distributor defendant stated: "They are automatically trying to set up a model arrangement for the United States without giving us anything to say about it." A letter from a representative of a third distributor defendant advised that defendant O'Donnell was "making some unfair demands" and imposing conditions "of which he is a flagrant violator."

16. During the summer of 1934 defendants Hoblitzelle and O'Donnell, representing Interstate, conferred at various times with the representatives of each distributor defendant. In the course of these conferences all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more, and there were five cities, Austin, Dallas, Fort Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions only in four of these cities, Dallas, Fort Worth, Houston and San Antonio.

Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run theatres in Austin in the 1934-1935 season, but in the two following seasons, it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio.

17. Metro and Paramount incorporated the agreement to impose restrictions in their written contracts with Interstate [fol. 58] for the 1934-1935 season. The other distributor defendants carried out the agreement without embodying it in their written licensing contracts with Interstate for the 1934-1935 season. The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same.

18. None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction as to the admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934.

It is agreed, however, that no demands were made in behalf of the defendant, Texas Consolidated, upon the distributor defendants for the imposition of said restrictions for the seasons 1935-1936 and 1936-1937.

19. The president of an organization composed of and representing independent exhibitors in Texas, after learning of the restrictions, called a meeting of the exhibitors affected and a committee was appointed to endeavor to persuade defendant Hoblitzelle to waive the proposed restrictions. The committee was given a hearing but met with no success. Defendant O'Donnell, who was aware of the hostility of the

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independent exhibitors to the restrictions, asked for and was given an opportunity to address a convention of their organization. The restrictions were strongly opposed by "independent" exhibitors, that is, those who are not affiliated with any distributor defendant.

[fol. 59] 20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally. The more nearly unanimous the action of the distributor defendants in imposing restrictions, the greater the benefit that would be derived by Interstate.

21. The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials.

22. From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not on one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

[fol. 60] 23. Hoblitzelle and O'Donnell, with their large interests in and managements of Interstate and Texas Con-

solidated, discussed among themselves the demand for an inclusion of two restrictions in all contracts that they were to make with defendant distributors on and after 1934-35. Hoblitzelle consulted his attorney and O'Donnell wrote the first letters hereinbefore mentioned on April of that year. Shortly after those letters were written, each was in California during meetings of at least some of the defendant distributor executives, and there then followed the demand later of July, 1934, heretofore mentioned. These discussions and these demands appear to have originated with Hoblitzelle and O'Donnell. Not with the distributor defendants. Such restrictions appeared to be advisable and imperative from the standpoint of Hoblitzelle and O'Donnell to their own interests as first and subsequent run exhibitors in the towns mentioned and as beneficial to the distributor defendants. The Hoblitzelle and O'Donnell interests were the largest purchasers of pictures in the covered area from the distributor defendants. Hoblitzelle and O'Donnell interests were active competitors with many subsequent run houses in the cities shown in these findings.

24. By 1934 the cost of operation of theatres and the cost of production of class A feature pictures had been steadily increasing. The cost of feature pictures distributed by the distributor defendants, ranged from \$150,000.00 to \$2,500,000.00. First run revenue had not kept pace with this increase.

IV. The Effect of the Conspiracy

25. Prior to the 1934-1935 season most of the independently operated subsequent run theatres in Texas charged an admission price of 15¢ or 20¢ and it was also customary to double bill, either on certain days in the week or as [fol. 61] occasion required. The restrictions imposed by the distributor defendants upon subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio caused some of said exhibitors, in order to be able to obtain pictures subject to the restrictions, to increase their admission price to 25¢, either generally or when pictures subject to the restrictions were shown, and have prevented these exhibitors from double billing any of such pictures. Practically all of the exhibitors who have so increased their admission price would not have done so but for the restrictions imposed by the distributor defendants. The restrictions in-

posed by the distributor defendants have caused other subsequent run exhibitors who were unable or unwilling to accept the restrictions to be deprived of the opportunity to exhibit any of the pictures subject to the restrictions, the best and most popular of all new feature pictures. The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry.

26. The restrictions imposed by the distributor defendants have increased the income of Interstate by attracting to its first run theatres charging an admission price of 40¢ or more patrons who, if the pictures shown at such theatres were later exhibited in the same city at a theatre charging an admission price of less than 25¢ or as part of a double feature program, would view these pictures at such other theatres. The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors and there is no evidence that such loss in income has been offset by the higher scale in admission prices which, because of the restrictions, some of the subsequent run theatres have adopted. Since the license fees which the distributor defendants charge Interstate for exhibiting feature pictures in its first run theatres are generally based upon a percentage of Interstate's receipts from these pictures, the increased income which Interstate has received because of [fol. 62] the restriction has also increased the income of the distributor defendants.

27. Defendant Hoblitzelle sought legal advice before he began crusading for these contracts. The attorney advised him that since distributors were copyright owners, they would have a right to enter into such stipulation with his company.

[fol. 63]

Conclusions of Law

1. The court has jurisdiction of this cause under the provisions of the act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

2. All of the distributor defendants by acting pursuant to a common plan and understanding in imposing the re-

strictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-1935 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

3. All of the distributor defendants, (with the exception of Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas), by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

4. Said combination and conspiracy among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and between the distributor defendants and subsequent run exhibitors.

5. Said combination and conspiracy effected an unreasonable restraint of interstate commerce in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures (1) to impose [fol. 64] upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and (2) not to enter into exhibition contracts with, that is, to boycott, any of these exhibitors unable or unwilling to accept such contract provisions.

6. The restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the copyright law.

Apart from the combination and conspiracy referred to in paragraphs 2 and 6 inclusive of these conclusions I reach

the following conclusions regarding certain provisions of each of the various license agreements involved:

7. Said provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

8. The provisions against double featuring appearing in the license agreements between all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

9. Such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate, for the seasons 1934-35 [fol. 65] and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

10. Such provisions as bind any or all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

11. Each and every agreement, whether oral or written, between all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the distributor defendants agree to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

12. Each and every agreement, whether oral or written, between all of the distributor defendants, (except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas), and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the said distributor defendants agree to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

Such undue and unreasonable restraint of interstate commerce is not within any privilege or immunity conferred upon the distributor defendants by the copyright law since the restraint was the product, not solely of the exercise of each defendant distributor's copyright privilege, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate license to exhibit certain feature pictures after Interstate's license privilege to exhibit these [fol. 66] pictures had expired.

13. The petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

14. The petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), binding said distributor defendants to impose said

restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

15. That the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

16. Attention is respectfully called to a written opinion in this case reported in 20 Fed. Supplement, 868, not as a compliance with Rule 70½, which failure I regret, but as showing substantially these same findings.

(Signed) Wm. H. Atwell, United States District Judge.

In Chambers, at Dallas, May 17, 1938.

[fol. 67] IN UNITED STATES DISTRICT COURT

OBJECTIONS OF DEFENDANTS TO THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND MOTION FOR MODIFICATION OF THE COURT'S FINDINGS IN ACCORDANCE WITH SUCH OBJECTIONS—Filed June 14, 1938.

Each of the defendants files the following objections to the Court's respective findings of fact and conclusions of law, and moves the Court to sustain each of said objections to the Court's respective findings of fact and conclusions of law, and to change and modify such findings of fact and conclusions of law to meet such objections. Each objection is separately urged by each defendant, but for the convenience of Court and counsel the objections and motions are included in one instrument.

1. The statement in the 10th paragraph of the Court's findings of fact, "They distribute about 75% of the total motion picture films that are distributed for exhibition in the United States," is contrary to the Agreed Statement of Facts, which provides that the defendant distributors distribute 75% of the first-class feature pictures exhibited in the United States.

2. In paragraph 12 of the Court's findings of fact the statement, "that on July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with George Shaeffer, of Paramount, in Los Angeles, California, sometime after April 25, 1934, O'Donnell [fol. 68] sent a second letter written on Interstate's letterhead, which was addressed jointly to the various Texas branch managers of the distributor defendants," is incorrect. The undisputed evidence shows that the letter of July 11, 1934, was addressed to each of the representatives of the distributors named in the letter. (S. F. Par. 11.) The conversation with Mr. Shaeffer was a private one between Hoblitzelle and O'Donnell and the President of Paramount, with no one else present, that Paramount owns an interest in Interstate Circuit, and the discussion was in reference to the inclusion of such restriction in Paramount's contract. (R. 175, 181, 170, 173.)

3. The statement in the last part of paragraph 12 of the Court's findings to the effect that the letter of July 11, 1934, included a demand that any feature pictures exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢, is contrary to the Agreed Statement of Facts, in which the letter is copied, and the letter clearly shows that the request made on behalf of Texas Consolidated was that any feature picture exhibited by Texas Consolidated first run in the Rio Grande Valley at an admission price of 35¢ must be restricted to subsequent runs in the Rio Grande Valley at 25¢. (S. F. Par. 11.)

4. The statement in paragraph 13 of the Court's findings of fact that "prior to the season of 1934-35 the licensing contracts of distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢," is contrary to the undisputed evidence, because in a number of cases the minimum admission price was 20¢ and in others 25¢. (R. 118, 203, 211.)

5. The statement in paragraph 13 of the Court's findings of fact to the effect that "there is no evidence that these contract provisions were adopted as a result of any agreement between any of the distributors and any of their licensees," is contrary to the undisputed evidence, which

[fol. 69] shows that the previous price restrictions were a part of the license agreements between the respective distributors and their licensees.

6. The statement in paragraph 13 of the Court's findings that "this price restriction contemplated that the distributor defendants agree to require that subsequent run exhibitors charge the requested minimum admission price," is contrary to the Agreed Statement of Facts and to the undisputed evidence, in that the price restriction contemplated that a particular distributor require its subsequent run exhibitors to charge the requested admission price, but did not contemplate any agreement among the distributors. (R. 63, 167, 179.)

7. In paragraph 14 of the Court's findings of fact the statement made by the Court, "Each distributor defendant thus restricting double billing was free to abandon the restriction at any time," is contrary to the undisputed evidence, because the provision against double billing was a part of the contract between the distributor and its licensee. (S. F. Par. 12.)

8. The statement in paragraph 14 of the Court's findings that, "Defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a restriction," is contrary to the undisputed evidence and the Agreed Statement of Facts. The letter of Mr. O'Donnell, set out in the Agreed Statement of Facts is not reasonably subject to such a construction, but, on the contrary, clearly shows that the only agreement contemplated was an agreement between an individual distributor and Interstate Circuit. The letter stated:

"In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices."

The evidence of Mr. O'Donnell, which is undisputed, shows that each distributor was told during the negotiations that if it did not desire to grant the restrictions, it definitely meant that its pictures could not be shown, for example, in [fol. 70] the Majestic and Palace Theatres in Dallas, with a minimum film rental of \$1500, but would be shown in the other theatres in Dallas where the minimum rental was \$150

in one instance and \$400 in the other. There was no evidence of any suggestion or proposal on O'Donnell's part or on the part of Hoblitzelle or Interstate Circuit that any of the distributors should make any agreement among themselves about the matter.

9. The statement in paragraph 15 of the Court's findings to the effect that in the negotiations which followed the O'Donnell letters each distributor was represented by its branch manager and by one or more superior officials from outside the State of Texas, is contrary to the undisputed evidence, because some of the representatives were not branch managers (R. 100, 101, 201), and the New York office representatives were not superior officials, but merely sales managers.

10. The statement in paragraph 15 of the Court's findings that, "Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence," should be eliminated, because it creates the impression that the distributor defendants had withheld certain correspondence, whereas the record shows that searches of the files were made and all the correspondence referred to was delivered by the defendants to the Government's counsel at the trial as a result of a request made by the Government for the first time on the first day of the trial, more than three years after the transactions occurred. One letter delivered to the Government was not introduced in evidence by the Government. (R. 160.)

11. The statement in paragraph 15 of the Court's findings to the effect that the branch managers, upon receipt of the letters, notified their home offices, and four of the eight branch managers could find in their files no correspondence, may indicate that these companies' home offices were notified by letter, whereas the undisputed evidence shows that [fol. 71] the local representatives of the distributors communicated with the home offices by telephone. The Court's construction of the letters written is not a correct construction and ignores the explanations made of the letters by the parties writing them. The statement, "that in each of these letters hostility to or criticism of the proposed restrictions was expressed," is incorrect, because in one of the letters there is a clear indication that Metro-Goldwyn-Mayer thought well of the restrictions. (R. 155.)

12. The statements in paragraph 16 of the Court's findings in reference to the negotiations between the respective distributors and Hoblitzelle and O'Donnell to the effect that "All of the distributor defendants agreed with Interstate Circuit to impose both of the requested restrictions upon subsequent run exhibitors, and Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more and there were five cities where Interstate operated such theatres and where there were competing subsequent run theatres," are contrary to the undisputed evidence. Negotiations between each distributor and Messrs. Hoblitzelle and O'Donnell, as shown by the undisputed evidence, clearly show that there was no agreement or understanding among the distributors, that each acted independently of the other, that the request for the restrictions by Interstate Circuit was only for the four cities of Dallas, Fort Worth, Houston and San Antonio, and that the cities of Austin and Galveston were not mentioned in any of these negotiations, and this statement of the Court's findings is contrary to the clear meaning of these negotiations. (R. 175-181.)

13. The statement in paragraph 17 of the Court's findings that "Metro and Paramount incorporated the agreement to impose the restrictions in their written contracts with Interstate Circuit for the 1934-35 season," is contrary to the Agreed Statement of Facts, which shows that Metro did not include in its written license contract with Interstate Circuit any agreement to impose the double feature restriction.

[fol. 72] 14. The statement in paragraph 17 of the Court's findings that "The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same," is contrary to the Agreed Statement of Facts. The evidence as to the respective distributors' contracts with their subsequent run exhibitors is set out in paragraph 12 of the Agreed Statement of Facts. It shows that the language is wholly dissimilar in the respective contracts. (R. 67-78.)

15. The statements in paragraph 18 of the Court's findings that "None of the distributor defendants, except Paramount, and it only for the 1934-35 season, imposed any re-

striction as to admission price on subsequent run exhibitors in cities either in the Rio Grande Valley or elsewhere in which Texas Consolidated operated its theatres. There is no evidence that prior to or during the negotiations with distributor defendants, defendants Hoblitzelle or O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934," are incorrect. The negotiations between the respective distributors and Hoblitzelle and O'Donnell clearly show that Texas Consolidated's request in the letter of July 11th was never mentioned in any of the negotiations. (R. 175-181.)

16. The statement in paragraph 19 of the Court's findings that "the restrictions were strongly opposed by independent exhibitors, that is, those who are not affiliated with any distributor defendant," carries with it the inference that all of the independent exhibitors were opposed to the restrictions, when the evidence shows that upon the trial of the case a number of them testified they were in favor of the restrictions and profited by reason of them. (R. 207, 208, 209, 212.)

17. The statement in paragraph 20 of the Court's findings [fol. 73] that "Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect," is contrary to the undisputed evidence and the Agreed Statement of Facts. The request of Interstate Circuit was for both restrictions. Each distributor was advised specifically that unless both restrictions were granted, its pictures could not be shown in Interstate's Class A theatres where there were large film rentals, but would have to be exhibited in its other theatres where there were small film rentals. Each distributor was given the choice of granting both restrictions and profiting, or declining to grant both restrictions and losing money. (S. F. Par. 11, 18 & 19; R. 79, 167, 179.)

18. The statement in paragraph 20 of the Court's findings that "Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distribu-

tor defendants would have caused such distributor defendants to lose the business of the subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally," is contrary to the Agreed Statement of Facts and the undisputed evidence. The adoption of either one or both of the restrictions by one or more distributor defendants would not have caused such distributor defendants to lose money. On the contrary the undisputed evidence shows that the rental, for example, at the Majestic and Palace Theatres in Dallas, was a minimum of \$1500 per picture. The minimum rental in the other two theatres in Dallas was \$150 in one and \$400 in the other. If any distributor had refused the request, it would have suffered a minimum loss of the difference between \$1500 and \$400 per picture, and this difference far exceeded the total license fees paid by subsequent run theatres on that picture. If one, two, three or more distributors had refused the request for the restrictions, each of those [fol. 74] refusing would have lost a large amount of film rental and each of those granting the request would have profited by a receipt of the large film rental. (R. 179.)

Paragraph 18 of the Agreed Statement of Facts reads:

"The exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city, will reduce the income of the first run theatre giving such exhibition and the total license fees of the distributor of such motion picture."

Paragraph 19 of the Agreed Statement of Facts reads:

"The exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture."

The finding of fact referred to immediately above is contrary to these two provisions of the Agreed Statement of Facts, which show that the total license fees, that is, the total license fees the distributor will receive from all sources, would have been reduced if either of these restrictions had not been granted.

The Government sought to prove by cross-examination of Mr. O'Donnell that in the absence of substantially unanimous action by the distributors with respect to the restrictions, the adoption of the restrictions by one or more individual distributors would have caused loss and damage to such distributors, but Mr. O'Donnell's testimony, which was undisputed, clearly shows that the distributor granting the restrictions would have benefited. (R. 194-5.)

19. The statements of the Court's findings in paragraph 21 that "The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials," are not supported by the evidence, in that there was no evidence that any of the superior officials of the distributor defendants participated in the negotiations. [fol. 75] The sales representatives of the respective companies, some from New York and some from Dallas, conducted the negotiations. The New York representatives came to Dallas and negotiated with Interstate Circuit in company with the local representatives. They all were merely employes of the distributor defendants. No evidence had been introduced of any combination, conspiracy or agreement among the several distributors to include the restrictions. The allegations of conspiracy in the Government's petition were officially denied by each distributor under oath. There was testimony from the local representatives of the distributors indicating that the companies acted independently. There was no showing that any of the New York representatives of the distributor defendants were in court or in Texas, and under these circumstances the fact that the New York sales representatives who participated in the negotiations were not brought to Dallas to testify in the case is not evidence of any unlawful agreement and cannot be used to make on behalf of the Government a prima facie case of an unlawful agreement, understanding or combination and should not be included in the Court's findings of fact.

20. The statement in paragraph 22 of the Court's findings, "and particularly from the unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other," is a mere conclusion, which the Supreme Court of the United States, in its opinion in this case, said was not sufficient as a finding of fact. It is contrary to the undisputed evidence and contrary to the Agreed Statement of Facts. There is no evidence of any communication of any kind between any distributor defendant and any other distributor defendant. There is positive evidence of the local representatives of the distributors indicating that there was no such agreement. The Agreed Statement of Facts and the undisputed evidence indicates that it was to the interest of [fol. 76] each to grant the restrictions and this Court is without power or authority to infer or find that there was any combination, conspiracy or agreement among the distributors to include the restrictions or either of them. (R. 167, 179.)

21. The statement in paragraph 23 of the Court's findings that "Shortly after these letters were written, each was in California during meetings of at least some of the defendant distributor executives, and there then followed the demand letter of July, 1934," is an incorrect statement, because the undisputed evidence shows that the meeting in California was a Paramount convention. There was no evidence that any representative of any other distributor was there, and the undisputed evidence shows that neither of the restrictions was discussed at any meeting of the California convention, but that the conversation was a private one between Mr. Hoblitzelle, Mr. O'Donnell and Mr. Shaeffer, President of Paramount, an owner of an interest in Interstate's business, and the testimony of Mr. O'Donnell shows that no one else was present at this conversation except Mr. Hoblitzelle, Mr. O'Donnell and Mr. Shaeffer. The statement, "of at least some of the distributor executives," creates the impression that there may have been others present at such conversation.

22. The statement in paragraph 25 of the Court's findings that "The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry," is contrary to the undisputed evidence. There were only four subsequent run theatres in the four cities that did not show Class A pictures. The evidence shows that in the neighborhoods of the poorer people the unrestricted pictures, not the restricted pictures, were the most popular. These theatres desired to exhibit only a few of the Class A pictures. There was no evidence that Class A pictures were the most popular pictures in these neighborhoods. (R. 112-115, 186.) The communities patronizing these four theatres were not deprived [fol. 77] altogether of the best entertainment furnished by the motion picture industry. The evidence shows that in Dallas, for example, there were twenty-one subsequent run theatres in competition with Interstate Circuit's theatres. Many of these had matinees on Saturdays and Sundays. The poorer people could see the pictures at 5¢ or 10¢ admission at the matinees, because the restrictions did not affect matinee prices. Many of the theatres in Dallas had balconies. Class A pictures could be seen from the balcony at 5¢, 10¢ or 15¢, or whatever price the individual exhibitor desired to charge. These theatres were located in various parts of Dallas and the poorer people were not deprived of the right to see the best pictures. (S. F. Par. 7; Testimony of Exhibitors.)

23. The statement in paragraph 26 of the Court's findings, "The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors, and there is no evidence that such loss in income has been offset by the higher scale in admission prices, which, because of the restrictions, some of the subsequent run theatres have adopted," is contrary to the evidence, which shows that the income of a majority of the subsequent run theatres was increased. If a subsequent run theatre owner had an attendance of 200 at a performance at his theatre at an admission price of 15¢, the total revenue for that performance would be \$30. If his admission price was increased to 25¢, his attendance would have to be reduced below 120 before such exhibitor would lose a cent. In other words, the decrease in the number of

attendants would have to be in excess of 40% before the subsequent run exhibitor would begin to lose money. There was no evidence that the subsequent run exhibitor suffered any such loss in attendance after the restrictions went into effect. Most of the subsequent run theatre owners' profits increased. (R. 121, 134, 142, 150, 190, 191, 204, 207, 212.)

24. The statements in paragraph 27 of the Court's findings that "Defendant Hoblitzelle sought legal advice before he began crusading for these contracts. The attorney advised him that since distributors were copyright owners, they would have a right to enter into such stipulation with his company," are incorrect. The record shows that the advice given Mr. Hoblitzelle by his attorney was: "Under the copyright law, I, as the licensee, would have the right to contract with the licensor, giving us exclusive right to show the pictures in Dallas. I also was advised that I had the lesser right to contract with the licensor that pictures shown at our theatre at a stipulated price should not be shown at a lesser price than the price agreed upon between me and the licensor." (R. 163.)

[fol. 79]

Conclusions of Law

1. The Court's second conclusion of law to the effect that all distributor defendants, by acting pursuant to a common plan and understanding in imposing the restriction as to admission price suggested by Interstate Circuit, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate Circuit and with each other, is erroneous. There was no evidence of such a common plan and understanding, and each distributor had the legal right to impose either or both of the restrictions for the protection of its business and to prevent damage to the first run licensee's business.

2. The Court's third conclusion of law to the effect that the distributor defendants other than Vitagraph and Metro Goldwyn Mayer, by acting pursuant to a common plan and understanding in imposing the restriction against double featuring suggested by Interstate Circuit, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate Circuit and each other, is erroneous, because there is no evidence of a common understanding among the distributors, and each of said

distributors had the legal right for the protection of the first run exhibition and for the protection of its license fees to impose said restrictions.

3. The Court's conclusions of law Nos. 2 and 3 are erroneous, because there is an absence from the record of any evidence of an agreement among the distributors to include the restrictions named. Each distributor, as the owner of a copyrighted motion picture photoplay, had the legal right to protect the granted right of first run exhibition from damage by covenanting with the first run licensee that certain pictures shown first run at an admission price of 40¢ or more should not thereafter be shown in the same city for less than 25¢ or as a part of a double feature program. [fol. 80] 4. The Court's conclusion of law No. 4 to the effect that said combination, conspiracy and agreement among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and between the distributor defendants and subsequent run exhibitors, is erroneous, because there is no evidence to support it, and any restraint of trade resulting from the imposition of either or both of said restrictions by any distributor is not a restraint of trade within the Sherman Anti-Trust Act.

5. The Court's conclusion of law No. 5 to the effect that said combination and conspiracy effected an unreasonable restraint of interstate commerce, in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures to impose upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and not to enter into exhibition contracts with, that is, to boycott any of these exhibitors unable or unwilling to accept such contract provisions, is erroneous, because there is no evidence to support it. The undisputed evidence shows that each agreement made was an agreement between a particular distributor and its licensee for the purpose of protecting the granted right of first run exhibition from damage by subsequent run exhibition, and any restraint resulting from such an agreement is not within the Sherman Anti-Trust Act.

6. The Court's conclusion of law No. 6 to the effect that the restraint of interstate commerce effected by united

exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the copyright law, is erroneous, because there is no evidence showing any agreement or understanding between the respective distributors in reference to the im-[fol. 81] position of the restrictions complained of, and the agreement between Interstate Circuit and any distributor that certain pictures shown first run at an admission price of 40¢ or more should not thereafter be exhibited in the same city for less than 25¢ or as a part of a double feature program was merely a covenant between the licensor and licensee of a copyrighted motion picture photoplay to protect the granted right of first run exhibition and the licensee's fee of that distributor, and such a contract is a legal contract, not condemned by the Sherman Anti-Trust Act.

7. The Court's conclusion of law No. 7 to the effect that, apart from the conspiracy above referred to, the provisions as to minimum night adult admission price appearing in the license agreements of the distributor defendants and subsequent run exhibitors restrain trade and commerce in feature films and are illegal and void, is erroneous because under the decisions of the United States Supreme Court such a provision has a reasonable relation to the reward of the copyrighted motion picture play and has a reasonable relation to the value of the granted right of first run exhibition, and any restraint of trade occasioned by such provision is not within the condemnation of the Sherman Anti-Trust Act.

8. The Court's conclusion of law No. 8 to the effect that the provisions against double featuring appearing in the license agreements between the distributor defendants and certain exhibitors in certain cities restrain trade and commerce in feature films and are illegal and void, is erroneous, because such a provision has a reasonable relation to the reward of the copyrighted motion picture photoplay and a reasonable relation to the granted right of first run exhibition, and any restraint of trade caused by such provision is not within the Sherman Anti-Trust Act.

9. The Court's conclusion of law No. 9 to the effect that any agreement between a distributor defendant and Inter-

state Circuit requiring the distributor to impose the night admission price restriction upon subsequent run exhibitors [fol. 82] in certain cities restrains trade and commerce in feature films and is illegal and void, is erroneous, because the respective distributors, licensors of copyrighted feature photoplays, and Interstate Circuit, the licensee, have the legal right to contract for such a restriction for the protection of the licensee and the licensor.

10. The Court's conclusion of law No. 10 to the effect that any provision of the contract between a distributor and Interstate Circuit requiring the distributor to impose the restriction against double featuring restrains trade and commerce in feature films and is illegal and void, is erroneous, because such a provision has a reasonable relation to the value of the first run exhibition and the license fees of the distributor and is not condemned by the Sherman Anti-Trust Act.

11. The Court's conclusion of law No. 11 is erroneous for the reasons stated in the objection to conclusion of law No. 10.

12. The Court's conclusion of law No. 12 is erroneous for the same reasons stated in objection to conclusion of law No. 10.

13. That part of the Court's conclusion of law No. 12 to the effect that the restraint of interstate commerce occasioned by an agreement between a particular distributor and Interstate Circuit to the effect that certain pictures shown first run at an admission price of 40¢ or more should not thereafter be shown as a part of a double feature program is not within any privilege or immunity conferred upon the distributor defendants by the Copyright Law, since the restraint was the product not solely of the exercise of each distributor defendant's copyright privilege, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate license to exhibit certain feature pictures after Interstate's license privilege to exhibit these pictures had expired, is erroneous, because the owner of a copyrighted motion picture photoplay, in granting a license to exhibit [fol. 83] that photoplay to a first run licensee, has the legal right to attach to such license agreement any condition having a reasonable relation to the value of the first run exhibition and to the value of the reward of the copyright.

Under the undisputed evidence and the Agreed Statement of Facts the restriction against double featuring has such relation.

Wherefore, each of the defendants prays that each of the objections to the findings of fact and conclusions of law be considered by the Court and that the findings of fact and conclusions of law be modified and changed to meet such objections.

Thompson, Knight, Baker, Harris & Wright, Geo.
S. Wright, Attorneys for all Defendants. Jno.
Moroney, Atty. for Exhibitor Defendants.

[fol. 84] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEFENDANTS' OBJECTIONS TO COURT'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed
July 5, 1938

The Court having fully considered each of the objections filed by each of the defendants in this cause to the findings of fact and conclusions of law, is of the opinion that each of said objections should be overruled.

It is therefore Ordered that each of said objections to the respective findings of fact and respective conclusions of law of the Court is hereby overruled, to which action of the Court each of the defendants in open court excepted.

July 5th, 1938.

Wm. H. Atwell, U. S. District Judge.

[fol. 85] IN UNITED STATES DISTRICT COURT

ORDER REFUSING DEFENDANTS' REQUESTED FINDINGS OF FACT
AND CONCLUSIONS OF LAW—Filed July 5, 1938

Be it Remembered that after the decision of the United States Supreme Court remanding this cause with directions to the trial court to file separate findings of fact and conclusions of law, each of the defendants presented to the court request for findings of fact and conclusions of law, which have been filed herein, each suggested finding of fact being a separate request for the finding of that fact. And

the court having fully considered the findings of fact and conclusions of law requested by each of the defendants as shown by the written request filed herein, and the findings of fact and conclusions of law requested by petitioner, and having filed in accordance with Equity Rule No. 70½ its own findings of fact and conclusions of law, is of the opinion that each of the findings of fact and conclusions of law requested by the defendants should be refused.

It is therefore Ordered that each of said requested findings of fact and conclusions of law filed by the defendants is refused, to which action of the Court each of the defendants in open court excepted.

July 5th, 1938.

Wm. H. Atwell, U. S. District Judge.

[fol. 86] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed June 9, 1938

The final decree herein dated October 13, 1937, having been set aside by the Supreme Court of the United States pending the making of findings of fact and conclusions of law by this court, pursuant to Equity Rule 70½, and said findings of fact and conclusions of law having been made and filed in this cause on the 17th day of May, 1938,

It is Hereby Ordered, Adjudged and Decreed as follows:

1. That the defendants Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia-Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Vitagraph, Inc., Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Corporation of Texas, Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas are sometimes hereinafter referred to as the distributor defendants.

2. That all of the distributor defendants and their respective officers, agents, representatives and employees be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreement with subsequent run exhibitors of motion films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such sub-

sequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

3. That all of the said distributor defendants, except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas, and their respective officers, agents, representatives and employees be, and they are hereby, perpetually enjoined [fol. 87] and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities above named, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

4. That all of the distributor defendants be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc.,—this latter company not having made any such agreements since 1934-35—Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

5. That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employees, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

[fol. 88] 6. That each and every one of the corporate defendants and their respective officers, agents, representatives and employees, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

7. That the petitioner recover of the defendants its costs herein.

Dallas, Texas, this 9th day of June, 1938.

Wm. H. Atwell, United States District Judge.

Approved: Berkeley W. Henderson, Special Assistant to the Attorney General of counsel for Petitioner. — — —, Attorneys for the Defendants.

[fols. 89-91] Order extending term, filed July 5, 1938, omitted in printing.

[fol. 92] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., ET AL., ORDER ALLOWING APPEAL FIXING AMOUNT OF BOND—Filed July 6, 1938

To the Honorable Judge of Said Court:

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, petitioners, jointly and severally pray an appeal from the judgment, decree and final order of the District Court of the United States for the Northern District of Texas, Dallas Division, and respectfully show as follows:

(1) That the evidence in this case was taken in open court and final decree entered on the 13th day of October,

1937, which decree was reversed by the Supreme Court of the United States on the 25th day of April, 1938, with directions to the trial court that Findings of Fact and Conclusions of Law, under Equity Rule 70½, be filed by the trial court. Thereafter, the trial court, in accordance with such directions, filed Findings of Fact and Conclusions of Law, and on the 9th day of June, 1938, entered final decree in which it was adjudged in substance as follows:

The final decree herein dated October 13, 1937, having been set aside by the Supreme Court of the United States pending the making of findings of fact and conclusions of law by this court, pursuant to Equity Rule 70½, and said findings of fact and conclusions of law having been made [fol. 93] and filed in this cause on the 17th day of May, 1938.

It is hereby ordered, adjudged and decreed as follows:

1. That the defendants Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Vitagraph, Inc., Twentieth Century-Fox Film Corporation, Twentieth Century-Fox Film Corporation of Texas, Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas are sometimes hereinafter referred to as the distributor defendants.

2. That all of the distributor defendants and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

3. That all of the said distributor defendants, except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas, and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempt-

ing to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities above named, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

[fol. 94] 4. That all of the distributor defendants be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc.,—this latter company not having made any such agreements since 1934-35—, Karl Hoblitzelle and R. J. O'Donnell operate picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, and R. J. O'Donnell, or any of them.

5. That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

6. That each and every one of the corporate defendants and their respective officers, agents, representatives and employes, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or [fol. 95] similar combination, conspiracy or agreement.

7. That the petitioner recover of the defendants its costs herein.

(2) Each petitioner saved due exception to the order and final decree of said court granting the relief to the plaintiff, United States of America.

(3) Each petitioner further alleges that the honorable district court erred in rendering said final decree, and the errors are shown in the assignments of error herewith filed and made a part of this prayer for appeal.

Petitioners present their joint and several assignments of error and respectfully pray that an appeal may be allowed.

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro Goldwyn Mayer Distributing Corporation, Metro Goldwyn Mayer Distributing Corporation of Texas, Twentieth Century Fox Film Corporation, and, Twentieth Century Fox Film Corporation of Texas, Petitioners, by Geo. S. Wright, Their Counsel.

ORDER ALLOWING APPEAL

The foregoing joint and several appeal is allowed upon giving bond for costs as required by law in the sum of \$1,000.00. July 6, 1938.

Wm. H. Atwell, United States District Judge.

[fol. 96] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR OF PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., ET AL.—Filed July 6, 1938

Paramount Pictures Distributing Company, Inc., (hereinafter called "Paramount"), Vitagraph, Inc. (hereinafter called "Vitagraph"), RKO-Radio Pictures, Inc. (hereinafter called "RKO"), Columbia Pictures Corporation (hereinafter called "Columbia"), United Artists Corporation (hereinafter called "United Artists"), Universal Film

Exchanges, Inc. (hereinafter called "Universal"), Metro-Goldwyn-Mayer Distributing Corporation (hereinafter called "Metro"), Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation (hereinafter called "Fox"), and Twentieth Century-Fox Film Corporation of Texas, defendants in the Trial Court (hereinafter sometimes referred to collectively as "the distributor defendants"), represent that in the proceedings had in the above entitled cause and in the rendition of the final decree there is error, which final decree of the District Court of the United States for the Northern District of Texas, Dallas Division, should be reversed, and file the following joint and several assignments of error, upon which each will rely upon appeal from the said final decree made by said Honorable Court on June 9, 1938, and say that said Honorable Court erred in the following respects:

1

The Court erred in perpetually enjoining and restraining all of the distributor defendants and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective [fol. 97] license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

2

The Court erred in perpetually enjoining and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

3

The Court erred in enjoining and restraining all of the distributor defendants from including in any future license agreements with subsequent run exhibitors in any city in the States of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

[fol. 98]

4

The Court erred in perpetually enjoining and restraining defendant Interstate Circuit, Inc., its officers, agents, representatives and employees, and the individual defendants (Karl Hoblitzelle and R. J. O'Donnell) from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price, or against double featuring.

5

The Court erred in perpetually enjoining and restraining each and every one of the corporate defendants and their respective officers, agents, representatives and employees, and each of the individual defendants from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

6

The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence.

7

The Court erred in finding as a fact (Findings of Fact No. 10) that the distributor defendants distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States, and in overruling defendants' objection to such finding of fact.

8

The Court erred in finding as a fact (Findings of Fact No. 12) that the letter, dated July 11, 1934, sent by R. J. O'Donnell on Interstate's letterhead, included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley, at an [fol. 99] admission price of 35¢ or more, should not thereafter be exhibited in the same city at an admission price of less than 25¢, and in overruling defendants' objection to such finding of fact.

9

The Court erred in finding as a fact (Findings of Fact No. 13) that prior to the 1934-1935 season the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢, and in overruling defendants' objection to such finding of fact.

10

The Court erred in failing to find as a fact that prior to the 1934-1935 season, United Artists had a definite policy against double featuring (R. 213).

11

The Court erred in finding as a fact (Findings of Fact No. 15) that in the negotiations with Interstate with reference to contracts for the 1934-1935 season, each distributor defendant was represented not only by its branch manager, but also by one or more superior officials from outside the State of Texas, and in overruling defendants' objection to such finding of fact.

12

The Court erred in failing and refusing to find as a fact that, upon receipt of the letters of April 25, 1934, and July

11, 1934, from R. J. O'Donnell, representatives of four of the distributor defendants (United Artists, Metro, Paramount and Vitagraph) expressed immediate agreement with the plan suggested in such letters, that only one distributor defendant (Universal) expressed hostility to the plan and that its primary concern was as to the number of its pictures which Interstate Circuit showed first run in its Class A theatres and that, with respect to the three other distributor defendants (RKO, Fox and Columbia), there is no evidence, other than their eventual agreement to the plan, of the immediate reaction of their representatives thereto.

[fol. 100]

13

The Court erred in failing and refusing to find as a fact that at the conference between the defendants Hoblitzelle and O'Donnell, representing Interstate, and the representatives of each distributor defendant during the summer of 1934 with respect to the 1934-1935 licensing agreements, only the representatives of Interstate and of the particular distributor defendant involved were present.

14

The Court erred in finding as a fact (Findings of Fact No. 17) that the substance of the restrictions imposed by each distributor defendant was the same.

15

The Court erred in finding as a fact (Findings of Fact No. 17) that Metro incorporated in its written contract with Interstate for the 1934-1935 season an agreement to impose both restrictions, and in overruling defendants' objection to such finding of fact.

16

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants and defendants Hoblitzelle and O'Donnell, the request for a price restriction in the Rio Grande Valley, which was made on behalf of Texas Consolidated in the letter of July 11, 1934, was never mentioned.

The Court erred in failing and refusing to find as a fact that there is no evidence that the price restriction in the Rio Grande Valley, requested by Texas Consolidated in the letter of July 11, 1934, was to the advantage of any distributor defendant, and in considering the fact that none of the distributor defendants imposed such restriction as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it.

[fol. 101]

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants (except Universal) and defendants Hoblitzelle and O'Donnell, the request for the restrictions in the City of Austin, was never mentioned; in failing and refusing to find that there is no evidence that any subsequent run theatres in the City of Austin charged an admission price of less than 25¢, and in considering the fact that only one of the distributor defendants (and it only for a single season) agreed to impose the restrictions in the City of Austin as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate to agree with Interstate to impose the restrictions requested by it.

The Court erred in finding as a fact (Findings of Fact No. 19) that the restrictions were strongly opposed by exhibitors not affiliated with any distributor defendant and that defendant O'Donnell was aware of the hostility of such exhibitors; and in considering such facts thus erroneously found in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

20

The Court erred in finding as a fact (Findings of Fact No. 20) that in the absence of substantially unanimous action by all of the distributor defendants with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions, and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally, and in considering such facts [fol. 102] thus erroneously found as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendant's objection to such finding of fact.

21

The Court erred in failing and refusing to find as a fact that adoption of the restrictions by each of the distributor defendants would have been to its own independent advantage, irrespective of any action taken by any of the other distributor defendants, and that less than substantially unanimous action by all of the distributor defendants would not have been harmful to any distributor defendant adopting the restrictions.

22

The Court erred in failing and refusing to find as a fact that failure of any distributor defendant to adopt either or both of the restrictions would have caused it a serious loss in first run revenue and would have reduced its total license fees.

23

The Court erred in failing and refusing to find as a fact that, since the request of Interstate was for the imposition of both the price and double feature restrictions, imposition by any distributor defendant of one of the requested restrictions without the other would not have been a compliance by it with the request of Interstate Circuit, and that such non-compliance would have caused such distributor de-

defendant a serious loss in first run revenue and would have reduced its total license fees.

24

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 18 of the Agreed Statement of Facts that the exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

25

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 19 of the Agreed Statement of Facts that the exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture.

26

The Court erred in failing and refusing to find as a fact that the imposition of the restrictions by each distributor defendant, pursuant to agreement with or at the instance and behest of Interstate, had a reasonable relationship to the reward of the copyrights owned by such distributor defendant and was necessary for the protection of the profits accruing to it from the exhibition of its copyrighted films.

27

The Court erred in finding as a fact (Findings of Fact No. 21) that the most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and that facts material to this issue were within the peculiar knowledge of the superior officials of the distributor defendants outside the State of Texas who negotiated the 1934-1935 contracts with Interstate, and in considering the fact that the distributor defendants did not call any of such superior officials as wit-

nesses as evidence to support its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

[fol. 104]

28

The Court erred in finding (Findings of Fact No. 22) on the basis of the facts set forth in Findings 12 to 21, inclusive, that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, and in overruling defendants' objection to such finding of fact.

29

The Court erred in finding as a fact (Findings of Fact No. 22) that there was unanimity of action on the part of the distributor defendants not in one respect only but in many different respects, and in finding that the situation was such that, apart from agreement, diverse action would inevitably have resulted, and in overruling defendants' objection to such finding of fact.

30

The Court erred in finding as a fact (Findings of Fact No. 23) that shortly after April 25, 1934, Hoblitzelle and O'Donnell were in California during meetings of at least some of the defendant distributor executives, and in overruling defendants' objection to such finding of fact.

31

The Court erred in failing and refusing to find as a fact that the distributor defendants did not agree and conspire among themselves with respect to the action to be taken by them upon the proposals made by Interstate, and that they did not agree and conspire among themselves to agree with Interstate to impose the restrictions requested by Interstate.

32

The Court erred in failing and refusing to find as a fact that the granting of Interstate's request by the several distributors does not create any inference of any combination, conspiracy or agreement among the distributor defendants.

[fol. 105]

33

The Court erred in finding as a fact (Findings of Fact No. 25) that the effect of the restrictions upon the low-income members of the community patronizing theatres who were unable or unwilling to accept the restrictions was to withhold from them altogether the best entertainment furnished by the motion picture industry, and in overruling defendants' objection to such finding of fact.

34

The Court erred in finding as a fact (Findings of Fact No. 26) that attendance deflected from subsequent run theatres to Interstate's first run theatres as a result of imposition of the restrictions has reduced the income of subsequent run exhibitors, and in further finding that there is no evidence that such loss of income has been offset by the higher scale in admission prices, which because of the restrictions, some of the subsequent run theatres have adopted, and in overruling defendants' objection to such finding of fact.

35

The Court erred in failing and refusing to find as facts the facts as recited in the stipulation of facts.

36

The Court erred in failing and refusing to adopt each of the several findings of fact proposed by the defendants in their proposed findings of fact numbered consecutively from 2 to 40, inclusive.

For convenience of the Court, and to save repetition of the record, errors are thus severally assigned upon each refusal to find the facts as requested without repeating here each request, all of which appear in the defendants' proposed findings of fact and conclusions of law.

37

The Court erred in its Conclusion of Law No. 2 that all of the distributor defendants, by acting pursuant to a common plan and understanding in imposing the restrictions [fol. 106] as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the season of 1934-1935 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

38

The Court erred in its Conclusion of Law No. 3 that all of the distributor defendants (with the exception of Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring, suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

39

The Court erred in its Conclusion of Law No. 4 that the combination and conspiracy described in Conclusions of Law Nos. 2 and 3 restrained interstate commerce in motion picture films.

40

The Court erred in its Conclusion of Law No. 5 that said combination and conspiracy effected an unreasonable restraint of interstate commerce.

41

The Court erred in its Conclusion of Law No. 6 that the restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted

feature pictures is not within any privileges or immunities conferred by the Copyright Law.

[fol. 107]

42

The Court erred in its Conclusion of Law No. 7 that the provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

43

The Court erred in its Conclusion of Law No. 8 that the provisions against double featuring appearing in the license agreements between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

44

The Court erred in its Conclusion of Law No. 9 that such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

45

The Court erred in its Conclusion of Law No. 10 that such provisions as bind any or all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate for the seasons 1934-

1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

[fol. 108]

46

The Court erred in its Conclusion of Law No. 11 that each and every agreement, whether oral or written, between all of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, wherein the distributor defendants agreed to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio is illegal and void.

47

The Court erred in its Conclusion of Law No. 12 that each and every agreement, whether oral or written, between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and Interstate for the seasons 1934-1935 and subsequent thereto, wherein the said distributor defendants agreed to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void, and in concluding as a matter of law that such agreement constitutes an undue and unreasonable restraint of interstate commerce and is not within any privilege or immunity conferred upon the distributor defendants by the Copyright Law.

48

The Court erred in its Conclusion of Law No. 13 that the petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

[fol. 109]

49

The Court erred in its Conclusion of Law No. 14 that the petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

50

The Court erred in its Conclusion of Law No. 15 that the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

51

The Court erred in failing and refusing to conclude as a matter of law that each distributor defendant, as the owner of copyrighted motion picture photoplays, had the legal right, acting independently of any other distributor, to include either or both of the restrictions in subsequent run license agreements, pursuant to agreement with or at the instance and behest of Interstate Circuit.

52

The Court erred in failing and refusing to conclude as a matter of law that, since the first agreement between Interstate Circuit and a single distributor containing the restrictive provisions was a legal contract, the fact that thereafter at different times each of the distributors, acting independently of each other, entered into similar agreements with Interstate Circuit does not constitute an agree-

ment, combination or conspiracy in violation of the Sherman Anti-Trust Law.

53

The Court erred in failing and refusing to conclude as a matter of law that there was no evidence to authorize an inference of conspiracy, combination or agreement among the distributor defendants.

54

The Court erred in failing and refusing to conclude as a matter of law that the price and double featuring restrictions imposed by the distributor defendants, pursuant to agreement with or at the instance and behest of Interstate Circuit, did not unreasonably restrain interstate trade or commerce.

55

The Court erred in enjoining and restraining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy and agreement described in the Findings of Fact and Conclusions of Law, and from entering into or becoming a party to a like or similar combination, conspiracy or agreement, when under the undisputed evidence Texas Consolidated Theatres, Inc., did not make any contract with reference to either of said restrictions with any distributor other than Paramount.

56

The Court erred in enjoining each distributor defendant from including in its license agreements with subsequent run exhibitors any restriction as to admission price to be charged by said subsequent run exhibitor for such motion picture films or as to double featuring as a result of any agreement between said distributor and Texas Consolidated Theatres, Inc.

Wherefore, petitioners jointly and severally pray that the said final decree of the District Court of the United States for the Northern District of Texas, Dallas Division, be set [fol. 111] aside and reversed; that the respective injunctions granted by said Court be dissolved and judgment rendered herein for each of the petitioners, or that the cause be remanded to the court below with directions to dismiss said

cause of action for want of equity for reasons set forth in the assignments of error, and for other and further relief.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Attorneys for Petitioners, Paramount Pictures Distributing Co., Inc., et al.

{fol. 112] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL OF INTERSTATE CIRCUIT, INC., ET AL.,
ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND—
Filed July 6, 1938

To the Honorable Judge of Said Court:

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, petitioners, jointly and severally pray an appeal from the judgment, decree and final order of the District Court of the United States for the Northern District of Texas, Dallas Division, and respectfully show as follows:

(1) That the evidence in this case was taken in open court and final decree entered on the 13th day of October, 1937, which decree was reversed by the Supreme Court of the United States on the 25th day of April, 1938, with directions to the trial court that Findings of Fact and Conclusions of Law, under Equity Rule 70½, be filed by the trial court. Thereafter, the trial court, in accordance with such directions, filed Findings of Fact and Conclusions of Law, and on the 9th day of June, 1938, entered final decree in which it was adjudged in substance as follows:

The final decree herein dated October 13, 1927, having been set aside by the Supreme Court of the United States pending the making of findings of fact and conclusions of law by this court, pursuant to Equity Rule 70½, and said findings of fact and conclusions of law having been made and filed in this cause on the 17th day of May, 1938.

It is hereby ordered, adjudged and decreed as follows:

1. That the defendants Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Vitagraph, Inc., Twentieth

Century-Fox Film Corporation, Twentieth Century-Fox Film Corporation of Texas, Metro-Goldwyn-Mayer Distributing Corporation, and Metro-Goldwyn-Mayer Distributing Corporation of Texas are sometimes hereinafter referred to as the distributor defendants.

2. That all of the distributor defendants and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

3. That all of the said distributor defendants, except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas, and their respective officers, agents, representatives and employes be, and they are hereby, perpetually enjoined and restrained from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities above named, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

4. That all of the distributor defendants be, and they are hereby, enjoined and restrained from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Con-[fol. 114] solidated Theatres, Inc.,—this latter company not having made any such agreements since 1934-35, Karl Hobbeltzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said dis-

tributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

5. That the defendant, Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants be, and they are hereby, perpetually restrained and enjoined from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring hereinbefore referred to.

6. That each and every one of the corporate defendants and their respective officers, agents, representatives and employes, and each of the individual defendants be, and they are hereby, perpetually enjoined and restrained from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

7. That the petitioner recover of the defendants its costs herein.

[fol. 115] (2) Each petitioner save due exception to the order and final decree of said court granting the relief to the plaintiff, United States of America.

(3) Each petitioner further alleges that the honorable district court erred in rendering said final decree, and the errors are shown in the assignments of error herewith filed and made a part of this prayer for appeal.

Petitioners present their joint and several assignments of error and respectfully pray that an appeal may be allowed.

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, and R. J. O'Donnell, Petitioners, by Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, John R. Moroney, Their Attorneys.

ORDER ALLOWING APPEAL

The foregoing joint and several appeal is allowed upon giving bond for costs as required by law in the sum of \$1,000.

July 6, 1938.

Wm. H. Atwell, United States District Judge for the Northern District of Texas, Dallas Division.

[fol. 116] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR OF INTERSTATE CIRCUIT, INC., ET AL.
—Filed July 6, 1938

Interstate Circuit, Inc. (hereinafter sometimes called "Interstate"), Texas Consolidated Theatres, Inc. (hereinafter sometimes called "Texas Consolidated"), Karl Hobbeltzelle and R. J. O'Donnell, defendants in the trial court, represent that in the proceedings had in the above entitled cause and in the rendition of the final decree there is error, which final decree of the District Court of the United States for the Northern District of Texas, Dallas Division, should be reversed, and file the following joint and several assignments of error, upon which each will rely upon appeal from the said final decree made by said Honorable Court on June 9, 1938, and say that said Honorable Court erred in the following respects:

1

The Court erred in perpetually enjoining and restraining all of the distributor defendants and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more.

[fol. 117]

2

The Court erred in perpetually enjoining and restraining all of the distributor defendants (except Vitagraph, Metro

and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and their respective officers, agents, representatives and employes from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films distributed by them in the cities of Dallas, Fort Worth, Houston and San Antonio, prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

3

The Court erred in enjoining and restraining all of the distributor defendants from including in any future license agreements with subsequent run exhibitors in any city in the States of Texas or New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, operate motion picture theatres, any restrictions as to the admission price to be charged by said subsequent run exhibitors for such motion picture films or as to double featuring as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, and any of them, or between the said distributor defendants, and any of them, and the said Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, or any of them.

4

The Court erred in perpetually enjoining and restraining defendant Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants (Karl Hoblitzelle and R. J. O'Donnell) from enforcing or attempting to enforce any provisions in their said license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture [fol. 118] films distributed by said distributor defendants the restrictions as to night adult lower floor admission price, or against double featuring.

5

The Court erred in perpetually enjoining and restraining each and every one of the corporate defendants and their

respective officers, agents, representatives and employes, and each of the individual defendants from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law herein, and from entering into or becoming a party to any like or similar combination, conspiracy or agreement.

6

The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence.

7

The Court erred in finding as a fact (Findings of Fact No. 10) that the distributor defendants distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States, and in overruling defendants' objection to such finding of fact.

8

The Court erred in finding as a fact (Findings of Fact No. 12) that the letter, dated July 11, 1934, sent by R. J. O'Donnell on Interstate's letterhead, included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley, at an admission price of 35¢ or more, should not thereafter be exhibited in the same city at an admission price of less than 25¢, and in overruling defendants' objection to such finding of fact.

9

The Court erred in finding as a fact (Findings of Fact No. 13) that prior to the 1934-1935 season the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases [fol. 119] the minimum was 10¢, and in overruling defendants' objection to such finding of fact.

10

The Court erred in failing to find as a fact that prior to the 1934-1935 season, United Artists had a definite policy against double featuring (R. 213).

11

The Court erred in finding as a fact (Findings of Fact No. 15) that in the negotiations with Interstate with reference to contracts for the 1934-1935 season, each distributor defendant was represented not only by its branch manager, but also by one or more superior officials from outside the State of Texas, and in overruling defendants' objection to such finding of fact.

12

The Court erred in failing and refusing to find as a fact that, upon receipt of the letters of April 25, 1934, and July 11, 1934, from R. J. O'Donnell, representatives of four of the distributor defendants (United Artists, Metro, Paramount and Vitagraph) expressed immediate agreement with the plan suggested in such letters, that only one distributor defendant (Universal) expressed hostility to the plan and that its primary concern was as to the number of its pictures which Interstate Circuit showed first run in its Class A theatres and that, with respect to the three other distributor defendants (RKO, Fox and Columbia), there is no evidence, other than their eventual agreement to the plan, of the immediate reaction of their representatives thereto.

13

The Court erred in failing and refusing to find as a fact that at the conferences between the defendants Hoblitzelle and O'Donnell, representing Interstate, and the representatives of each distributor defendant during the summer of 1934 with respect to the 1934-1935 licensing agreements, only the representatives of Interstate and of the particular distributor defendant involved were present.

[fol. 120]

14

The Court erred in finding as a fact (Findings of Fact No. 17) that the substance of the restrictions imposed by each distributor defendant was the same.

15

The Court erred in finding as a fact (Findings of Fact No. 17) that Metro incorporated in its written contract with Interstate for the 1934-1935 season an agreement to

impose both restrictions, and in overruling defendants' objection to such finding of fact.

16

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants and defendants Hoblitzelle and O'Donnell, the request for a price restriction in the Rio Grande Valley, which was made on behalf of Texas Consolidated in the letter of July 11, 1934, was never mentioned.

17

The Court erred in failing and refusing to find as a fact that there is no evidence that the price restriction in the Rio Grande Valley, requested by Texas Consolidated in the letter of July 11, 1934, was to the advantage of any distributor defendant, and in considering the fact that none of the distributor defendants imposed such restriction as evidence in support of its finding of fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it.

18

The Court erred in failing and refusing to find as a fact that during the negotiations between the distributor defendants (except Universal) and defendants Hoblitzelle and O'Donnell, the request for the restrictions in the City of Austin, was never mentioned; in failing and refusing to find that there is no evidence that any subsequent run theatres [fol. 121] in the City of Austin charged an admission price of less than 25¢, and in considering the fact that only one of the distributor defendants (and it only for a single season) agreed to impose the restrictions in the City of Austin as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate to agree with Interstate to impose the restrictions requested by it.

19

The Court erred in finding as a fact (Findings of Fact No. 19) that the restrictions were strongly opposed by ex-

hibitors not affiliated with any distributor defendant and that defendant O'Donnell was aware of the hostility of such exhibitors and in considering such facts thus erroneously found in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

20

The Court erred in finding as a fact (Findings of Fact No. 20) that in the absence of substantially unanimous action by all of the distributor defendants with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions, and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally, and in considering such facts thus erroneously found as evidence in support of its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

[fol. 122]

21

The Court erred in failing and refusing to find as a fact that adoption of the restrictions by each of the distributor defendants would have been to its own independent advantage, irrespective of any action taken by any of the other distributor defendants, and that less than substantially unanimous action by all of the distributor defendants would not have been harmful to any distributor defendant adopting the restrictions.

22

The Court erred in failing and refusing to find as a fact that failure of any distributor defendant to adopt either or both of the restrictions would have caused it a serious loss in first run revenue and would have reduced its total license fees.

23

The Court erred in failing and refusing to find as a fact that, since the request of Interstate was for the imposition of both the price and double feature restrictions, imposition by any distributor defendant of one of the requested restrictions without the other would not have been a compliance by it with the request of Interstate Circuit, and that such non-compliance would have caused such distributor defendant a serious loss in first run revenue and would have reduced its total license fees.

24

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 18 of the Agreed Statement of Facts that the exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

[fol. 123]

25

The Court erred in failing and refusing to find as a fact the fact recited in Paragraph 19 of the Agreed Statement of Facts that the exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fee of the distributor of such moving picture.

26

The Court erred in failing and refusing to find as a fact that the imposition of the restrictions by each distributor defendant, pursuant to agreement with or at the instance and behest of Interstate, had a reasonable relationship to the reward of the copyrights owned by such distributor defendant and was necessary for the protection of the profits accruing to it from the exhibition of its copyrighted films.

27

The Court erred in finding as a fact (Findings of Fact No. 21) that the most important issue in the case was

whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and that facts material to this issue were within the peculiar knowledge of the superior officials of the distributor defendants outside the State of Texas who negotiated the 1934-1935 contracts with Interstate, and in considering the fact that the distributor defendants did not call any of such superior officials as witnesses as evidence to support its Finding of Fact No. 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and to agree with Interstate to impose the restrictions requested by it, and in overruling defendants' objection to such finding of fact.

28

The Court erred in finding (Findings of Fact No. 22), on the basis of the facts set forth in Findings 12 to 21, inclusive, that the distributor defendants agreed and conspired among [fol. 124] themselves to take uniform action upon the proposals made by Interstate, and agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, and in overruling defendants' objection to such finding of fact.

29

The Court erred in finding as a fact (Findings of Fact No. 22) that there was unanimity of action on the part of the distributor defendants not in one respect only but in many different respects, and in finding that the situation was such that, apart from agreement, diverse action would inevitably have resulted, and in overruling defendants' objection to such finding of fact.

30

The Court erred in finding as a fact (Findings of Fact No. 23) that shortly after April 25, 1934, Hoblitzelle and O'Donnell were in California during meetings of at least some of the defendant distributor executives, and in overruling defendants' objection to such finding of fact.

31

The Court erred in failing and refusing to find as a fact that the distributor defendants did not agree and conspire among themselves with respect to the action to be taken by them upon the proposals made by Interstate, and that they did not agree and conspire among themselves to agree with Interstate to impose the restrictions requested by Interstate.

32

The Court erred in failing and refusing to find as a fact that the granting of Interstate's request by the several distributors does not create any inference of any combination, conspiracy or agreement among the distributor defendants.

33

The Court erred in finding as a fact (Findings of Fact No. 25) that the effect of the restrictions upon the low-[fol. 125] income members of the community patronizing theatres who were unable or unwilling to accept the restrictions was to withhold from them altogether the best entertainment furnished by the motion picture industry, and in overruling defendants' objection to such finding of fact.

34

The Court erred in finding as a fact (Findings of Fact No. 26) that attendance deflected from subsequent run theatres to Interstate's first run theatres as a result of imposition of the restrictions has reduced the income of subsequent run exhibitors, and in further finding that there is no evidence that such loss of income has been offset by the higher scale in admission prices, which, because of the restrictions, some of the subsequent run theatres have adopted, and in overruling defendants' objection to such finding of fact.

35

The Court erred in failing and refusing to find as a fact the facts as recited in the stipulation of facts.

36

The Court erred in failing and refusing to adopt each of the several findings of fact proposed by the defendants

in their proposed findings of fact numbered consecutively from 2 to 40, inclusive.

For convenience of the Court, and to save repetition of the record, errors are thus severally assigned upon each refusal to find the facts as requested without repeating here each request, all of which appear in the defendants' proposed findings of fact and conclusions of law.

37

The Court erred in its Conclusion of Law No. 2 that all of the distributor defendants, by acting pursuant to a common plan and understanding in imposing the restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio for the season 1934-1935 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

38

The Court erred in its Conclusion of Law No. 3 that all of the distributor defendants (with the exception of Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring, suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

39

The Court erred in its Conclusion of Law No. 4 that the combination and conspiracy described in Conclusions of Law Nos. 2 and 3 restrained interstate commerce in motion picture films.

40

The Court erred in its Conclusion of Law No. 5 that said combination and conspiracy effected an unreasonable restraint of interstate commerce.

41

The Court erred in its Conclusion of Law No. 6 that the restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the Copyright Law.

42

The Court erred in its Conclusion of Law No. 7 that the provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the [fol. 127] Cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

43

The Court erred in its Conclusion of Law No. 8 that the provisions against double featuring appearing in the license agreements between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio for the seasons 1934-1935 and subsequent thereto restrain trade and commerce in feature films and are illegal and void.

44

The Court erred in its Conclusion of Law No. 9 that such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between any or all of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

45

The Court erred in its Conclusion of Law No. 10 that such provisions as bind any or all of the distributor defendants

(except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) to impose said restrictions against double featuring upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

46

The Court erred in its Conclusion of Law No. 11 that each and every agreement, whether oral or written, between all [fol. 128] of the distributor defendants and Interstate for the seasons 1934-1935 and subsequent thereto, wherein the distributor defendants agreed to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio is illegal and void.

47

The Court erred in its Conclusion of Law No. 12 that each and every agreement, whether oral or written, between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) and interstate for the seasons 1934-1935 and subsequent thereto, wherein the said distributor defendants agreed to impose said restrictions against double featuring upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void, and in concluding as a matter of law that such agreement constitutes an undue and unreasonable restraint of interstate commerce and is not within any privilege or immunity conferred upon the distributor defendants by the Copyright Law.

48

The Court erred in its Conclusion of Law No. 13 that the petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corpora-

tion of Texas) from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the Cities of Dallas, Fort Worth, Houston and San Antonio.

49

The Court erred in its Conclusion of Law No. 14 that the petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its [fol. 129] agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas) binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the Cities of Dallas, Houston, Fort Worth and San Antonio.

50

The Court erred in its Conclusion of Law No. 15 that the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

51

The Court erred in failing and refusing to conclude as a matter of law that each distributor defendant, as the owner of copyrighted motion picture photoplays, had the legal right, acting independently of any other distributor, to include either or both of the restrictions in subsequent run license agreements, pursuant to agreement with or at the instance and behest of Interstate Circuit.

52

The Court erred in failing and refusing to conclude as a matter of law that, since the first agreement between Inter-

state Circuit and a single distributor containing the restrictive provisions was a legal contract, the fact that thereafter at different times each of the distributors, acting independently of each other, entered into similar agreements with Interstate Circuit does not constitute an agreement, combination or conspiracy in violation of the Sherman Anti-Trust Law.

53

The Court erred in failing and refusing to conclude as a matter of law that there was no evidence to authorize an inference of conspiracy, combination or agreement among the distributor defendants.

54

The Court erred in failing and refusing to conclude as a matter of law that the price and double featuring restrictions imposed by the distributor defendants, pursuant to agreement with or at the instance and behest of Interstate Circuit, did not unreasonably restrain interstate trade or commerce.

55

The Court erred in enjoining and restraining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy and agreement described in the Findings of Fact and Conclusions of Law, and from entering into or becoming a party to a like or similar combination, conspiracy or agreement, when under the undisputed evidence Texas Consolidated Theatres, Inc., did not make any contract with reference to either of said restrictions with any distributor other than Paramount.

56

The Court erred in enjoining each distributor defendant from including in its license agreements with subsequent run exhibitors any restriction as to admission price to be charged by said subsequent run exhibitor for such motion picture films or as to double featuring as a result of any agreement between said distributor and Texas Consolidated Theatres, Inc.

Wherefore, petitioners jointly and severally pray that the said final decree of the District Court of the United States

for the Northern District of Texas, Dallas Division, be set aside and reversed; that the respective injunctions granted by said Court be dissolved and judgment rendered herein [fol. 131] for each of the petitioners, or that the cause be remanded to the court below with directions to dismiss said cause of action for want of equity for reasons set forth in the assignments of error, and for other and further relief.

Thompson, Knight, Baker, Harris & Wright, Geo. S. Wright, Jno. R. Maroney, Attorneys for Petitioners, Interstate Circuit, Inc., et al.

[fols. 132-135] Bonds on appeal for \$1,000.00, approved and filed July 6, 1938, omitted in printing.

[fols. 136-141] Citation, in usual form, showing service on Clyde Eastus, filed July 6, 1938, omitted in printing.

[fol. 142] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 143] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 269

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 12, 1938

Come now the appellants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle and R. J. O'Donnell, and state that the points upon which they intend to reply in this Court in this case are as follows:

1. The Court erred in holding that the defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, by including by agreement with or at the instance and behest of

the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in license agreements for motion picture films released and distributed by them, beginning with the exhibition season of 1934-1935 and for each season subsequent thereto, with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, provisions requiring that said motion picture films so released and distributed by them that had been shown in the same city first run at a night adult lower floor admission price of 40¢ or more should not be exhibited by said subsequent run exhibitors for less than a night adult lower floor admission price of less than 25¢ and should not be exhibited as a part of a double feature program, have engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

2. The Court erred in holding that the defendant, Vitagraph, Inc., by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

3. The Court erred in holding that defendant, Metro-Goldwyn-Mayer Distributing Corporation, by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth and San Antonio, beginning with the exhibition season 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Kari Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in

said motion picture films in violation of the Sherman Anti-Trust Law.

4. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendants Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Twentieth Century-Fox Film Corporation of [fol. 145] Texas, is illegal and void.

5. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Vitagraph, Inc., is illegal and void.

6. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Metro-Goldwyn-Mayer Distributing Corporation, is illegal and void.

7. The Court erred in holding that the provision against double featuring, so included in subsequent run license agreements by defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, is illegal and void.

8. A distributor defendant as the owner of a copyrighted motion picture photoplay has the legal right:

(a) To attach to its license agreement with a first run exhibitor, its licensee, any condition that has a reasonable relation to the reward of its copyright. The reward of the copyright of a distributor is measured by the amount of its license fees;

(b) To so attach such a condition for its protection as licensor, for the protection of the licensee, the first run exhibitor, or for the mutual protection of the licensor and the licensee;

(c) To attach to its license agreement with subsequent run exhibitor in the same city with its first run licensee any

condition that has a reasonable relation to the reward of its copyright, for its protection, for the protection of the first run exhibitor, or for the mutual protection of the first run exhibitor and the distributor;

[fol. 146] (d) To contract with its first run licensee that the granted right of first run exhibition of a motion picture photoplay should not be impaired or destroyed by a subsequent exhibition at an admission price of less than 25¢ or as a part of a double feature program.

9. A first run exhibitor defendant, licensee of a copyrighted motion picture photoplay, has the legal right to contract with his licensor that the granted right of first run exhibition of such motion picture photoplay, shall not be impaired or destroyed by a subsequent exhibition of such motion picture photoplay at an admission price of less than 25¢ or as a part of a double feature program.

10. A first run exhibitor defendant as the licensee of copyrighted motion picture photoplays has the legal right to request, to urge, and to obtain for its protection from its licensor, a distributor defendant, an agreement to attach to its license contract any condition that has a reasonable relation to the reward of its copyright.

11. Any restraint of interstate commerce imposed by the attaching of any such condition to a license agreement is a restraint within the monopoly of the copyright and without the Sherman Anti-Trust Law.

12. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring is a condition attached to a license agreement that has a direct and positive relation to the reward of the copyright.

13. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring included by a distributor defendant in subsequent run license agreements at the instance of or by agreement with the first run licensee, had a reasonable relation to the protection of the value of the granted right of first run exhibition.

[fol. 147] 14. The agreed statement of facts and undisputed evidence show that there was an impelling business

reason for each distributor, acting independently, to attach such conditions to its license agreement, and there is no evidence from which the Court could find or legally infer that there was a conspiracy, combination and agreement among the several distributors in violation of the Sherman Anti-Trust Law to include either of said conditions.

15. The agreed statement of facts and undisputed evidence show that the inclusion of either or both of such provisions in license agreements by the several distributors did not unreasonably restrain commerce in violation of the Sherman Anti-Trust Act.

16. The Court erred in its decree in perpetually enjoining the corporate defendants from continuing in force such provisions in their respective license agreements with subsequent run exhibitors.

17. The Court erred in perpetually enjoining and restraining the defendants, Paramount Pictures Distributing Company, RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, their respective officers, agents, representatives and employees, from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films released and distributed by them in the cities above named requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited in the same city for a night adult lower floor admission price of 40¢ or more and prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

18. The Court erred in perpetually enjoining and restraining the defendants, Vitagraph, Inc., and Metro-Gold-[fol. 148] wyn-Mayer Distributing Corporation, their officers, agents, representatives, and employees, from enforcing or attempting to enforce said provisions in their license agreements with subsequent run exhibitors in reference to subsequent run admission price.

19. The Court erred in perpetually enjoining each of the defendants, Paramount Pictures Distributing Company.

Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Film Corporation of Texas, from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas and New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. (this latter company not having made any such agreements since 1934-1935), Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to admission price to be charged by said subsequent run exhibitors for such motion picture films, or as to double featuring, as a result of any combination, conspiracy or agreements, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, or any of them, or between the said distributor defendants, and any of them, and the said exhibitor defendants, and any of them.

20. The Court erred in enjoining Interstate Circuit, Inc., its officers agents, representatives and employes, and the individual defendants from enforcing or attempting to enforce any provision in license agreements with each or any of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films released and distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring.

21. The Court erred in enjoining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy [fol. 149] acy and agreement described in the findings of fact and conclusions of law, and from entering into or becoming a party to any like or similar combination, conspiracy and agreement, because Texas Consolidated Theatres, Inc., never made any contract in reference to either of the restrictions referred to, except with Paramount Pictures Distributing Company, Inc., and it was not a party to any conspiracy.

22. The Court erred in enjoining Interstate Circuit, Inc., from enforcing or attempting to enforce any provision in its license agreement with any distributor defendant requiring said distributor defendant to impose upon subse-

quent run exhibitors of motion picture films the restrictions as to night adult lower floor admission price or against double featuring.

23. The Court erred in enjoining Interstate Circuit, Inc., from making any contract in reference to price restriction or against double featuring with any distributor defendant.

24. The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence, for the reasons stated upon the record in support of each of said motions.

25. The Court erred in finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, Inc., and that they agreed and conspired with each other and with Interstate Circuit, Inc., to impose the restrictions requested by Interstate Circuit, Inc., upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, because there was no evidence showing such agreement and conspiracy or evidence from which it could be legally inferred that there was such an agreement and conspiracy.

26. The Court erred in considering the failure of the distributor defendants to call as witnesses any of the superior officials of distributor defendants from outside the State of Texas as a basis for the Court's finding that the distributor defendants agreed and conspired among themselves to take [fol. 150] uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors.

27. The Court erred in using as a basis for its finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors in the four cities named, a similarity of the provisions of the various distributors' contracts in reference to the restrictions requested by Interstate Circuit.

28. The finding of fact of the trial court to the effect that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon all subsequent run exhibitors in the cities named, is not supported by the evidence, but is contrary to the evidence.

Appellants further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above:

Title of Paper	Record Page
1. Printed Copy of Record, Form of Appeal to United States Supreme Court
2. Findings of Fact and Conclusions of Law requested by Petitioner
3. Memorandum in support of Findings requested by Petitioner
4. Findings of Fact and Conclusions of Law requested by Defendants
5. Memorandum in support of Findings requested by Defendants

[fol. 151]

6. Findings of Fact and Conclusions of Law of the District Court	.....
7. Defendants' Objections to Court's Findings of Fact and Conclusions of Law	.....
8. Order overruling Objections to the Court's Findings of Fact and Conclusions of Law	.....
9. Order of Court refusing Findings of Fact and Conclusions of Law requested by Defendants	.....
10. Final Decree of Trial Court	.....
11. Petition for Appeal	.....
12. Assignments of Error	.....
13. Order allowing Appeal	.....
14. Statement showing Jurisdiction of this Court under Equity Rule 12	.....
15. Notice of Appeal and Proof of Service thereof	.....

The printed record should also show that the original record on file contains:

1. Bonds on appeal approved by the Court on July 6th, 1938;
2. Citation on appeal;
3. Order of Court extending term in reference to this appeal;
4. Clerk's Certificate in due form.

Dated August 8th, 1938.

Thompson, Knight, Baker, Harris & Wright, Jno. R. Moroney, Geo. S. Wright, Counsel for Appellants, Interstate Circuit, Inc., et al.

[fol. 152] Received carbon copy of Statement of Points to be relied upon and Designation of Parts of the Record to be printed, pursuant to Rule 13 of the Rules of the Supreme Court of the United States, in the appeal of Paramount Pictures Distributing Company, et al., this 9th day of August, 1938.

N. A. Townsend, Acting Solicitor General, Counsel for Respondent.

[fol. 153] [File endorsement omitted.]

[fol. 154] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1938

No. 270

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 12, 1938

Come now the appellants, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Distributing Corporation of Texas, Twentieth Century-Fox Film Corporation, and Twentieth Century-Fox Film Corporation of Texas, and state that the points upon which they intend to rely in this Court in this case are as follows:

1. The Court erred in holding that the defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in license agreements for motion picture films released and distributed by them, beginning with the exhibition season of 1934-1935 and for each season subsequent thereto, with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, provisions requiring that said motion picture films so released and distributed by them that had been shown in the same [fol. 155] city first run at a night adult lower floor admission price of 40¢ or more should not be exhibited by said subsequent run exhibitors for less than a night adult lower floor admission price of less than 25¢ and should not be exhibited as a part of a double feature program, have engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

2. The Court erred in holding that the defendant, Vitagraph, Inc., by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth, Houston and San Antonio, beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

3. The Court erred in holding that defendant, Metro-Goldwyn-Mayer Distributing Corporation, by including by agreement with or at the instance and behest of the defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell, in its license agreements with subsequent run exhibitors in the cities of Dallas, Fort Worth and San An-

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tonio, beginning with the exhibition season of 1934-1935 and for each exhibition season subsequent thereto, said restriction as to minimum night adult lower floor admission price, has engaged in a combination, conspiracy and agreement with said defendants, Interstate Circuit, Inc., Karl Hoblitzelle and R. J. O'Donnell to restrain trade and commerce in said motion picture films in violation of the Sherman Anti-Trust Law.

4. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendants [fol. 156] Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Twentieth Century-Fox Film Corporation of Texas, is illegal and void.

5. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Vitagraph, Inc., is illegal and void.

6. The Court erred in holding that the provision as to minimum night adult lower floor admission price, so included in subsequent run license agreements by defendant, Metro-Goldwyn-Mayer Distributing Corporation, is illegal and void.

7. The Court erred in holding that the provision against double featuring, so included in subsequent run license agreements by defendants, Paramount Pictures Distributing Company, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, is illegal and void.

8. A distributor defendant as the owner of a copyrighted motion picture photoplay has the legal right:

(a) To attach to its license agreement with a first run exhibitor, its licensee, any condition that has a reasonable relation to the reward of its copyright. The reward of the copyright of a distributor is measured by the amount of its license fees;

(b) To so attach such a condition for its protection as licensor, for the protection of the licensee, the first run exhibitor, or for the mutual protection of the licensor and the licensee;

(c) To attach to its license agreement with subsequent run exhibitor in the same city with its first run licensee any condition that has a reasonable relation to the reward of its [fol. 157] copyright, for its protection, for the protection of the first run exhibitor, or for the mutual protection of the first run exhibitor and the distributor;

(d) To contract with its first run licensee that the granted right of first run exhibition of a motion picture photoplay should not be impaired or destroyed by a subsequent exhibition at an admission price of less than 25¢ or as a part of a double feature program.

9. A first run exhibitor defendant, licensee of a copyrighted motion picture photoplay, has the legal right to contract with his licensor that the granted right of first run exhibition of such motion picture photoplay, shall not be impaired or destroyed by a subsequent exhibition of such motion picture photoplay at an admission price of less than 25¢ or as a part of a double feature program.

10. A first run exhibitor defendant as the licensee of copyrighted motion picture photoplays has the legal right to request, to urge, and to obtain for its protection from its licensor, a distributor defendant, an agreement to attach to its license contract any condition that has a reasonable relation to the reward of its copyright.

11. Any restraint of interstate commerce imposed by the attaching of any such condition to a license agreement is a restraint within the monopoly of the copyright and without the Sherman Anti-Trust Law.

12. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring is a condition attached to a license agreement that has a direct and positive relation to the reward of the copyright.

13. The agreed statement of facts and the undisputed evidence show that each of the provisions as to subsequent run admission price and against double featuring included by a

distributor defendant in subsequent run license agreements [fol. 158] at the instance of or by agreement with the first run licensee, had a reasonable relation to the protection of the value of the granted right of first run exhibition.

14. The agreed statement of facts and undisputed evidence show that there was an impelling business reason for each distributor, acting independently, to attach such conditions to its license agreement, and there is no evidence from which the Court could find or legally infer that there was a conspiracy, combination and agreement among the several distributors in violation of the Sherman Anti-Trust Law to include either of said conditions.

15. The agreed statement of facts and undisputed evidence show that the inclusion of either or both of such provisions in license agreements by the several distributors did not unreasonably restrain commerce in violation of the Sherman Anti-Trust Act.

16. The Court erred in its decree in perpetually enjoining the corporate defendants from continuing in force such provisions in their respective license agreements with subsequent run exhibitors.

17. The Court erred in perpetually enjoining and restraining the defendants, Paramount Pictures Distributing Company, RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Twentieth Century-Fox Film Corporation of Texas, their respective officers, agents, representatives and employes, from enforcing or attempting to enforce the provisions in their respective license agreements with subsequent run exhibitors of motion picture films released and distributed by them in the cities above named requiring such subsequent run exhibitors to charge a minimum night adult lower floor admission price of not less than 25¢ for motion pictures that had previously been exhibited [fol. 159] in the same city for a night adult lower floor admission price of 40¢ or more and prohibiting such subsequent run exhibitors from showing said motion picture films as a part of a double feature program.

18. The Court erred in perpetually enjoining and restraining the defendants, Vitagraph, Inc., and Metro-Goldwyn-Mayer Distributing Corporation, their officers, agents,

representatives, and employes, from enforcing or attempting to enforce said provisions in their license agreements with subsequent run exhibitors in reference to subsequent run admission price.

19. The Court erred in perpetually enjoining each of the defendants, Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., Columbia Pictures Corporation, United Artists Corporation, Universal Film Exchanges, Inc., Metro-Goldwyn-Mayer Distributing Corporation, Twentieth Century-Fox Film Corporation and Twentieth Century-Fox Film Corporation of Texas, from including in any future license agreements with subsequent run exhibitors in any city in the states of Texas and New Mexico, or elsewhere, where the defendants, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. (this latter company not having made any such agreements since 1934-1935), Karl Hoblitzelle and R. J. O'Donnell operate motion picture theatres, any restrictions as to admission price to be charged by said subsequent run exhibitors for such motion picture films, or as to double featuring, as a result of any combination, conspiracy or agreement, or in furtherance of any combination, conspiracy or agreement among the said distributor defendants, or any of them, or between the said distributor defendants, and any of them, and the said exhibitor defendants, and any of them.

20. The Court erred in enjoining Interstate Circuit, Inc., its officers, agents, representatives and employes, and the individual defendants from enforcing or attempting to enforce any provision in license agreements with each or any [fol. 160] of the distributor defendants requiring said distributor defendants, or any of them, to impose upon subsequent run exhibitors of motion picture films released and distributed by said distributor defendants the restrictions as to night adult lower floor admission price or against double featuring.

21. The Court erred in enjoining Texas Consolidated Theatres, Inc., from continuing in the combination, conspiracy and agreement described in the findings of fact and conclusions of law, and from entering into or becoming a party to any like or similar combination, conspiracy and agreement, because Texas Consolidated Theatres, Inc., never made any contract in reference to either of the restrictions referred to, except with Paramount Pictures Dis-

tributing Company, Inc., and it was not a party to any conspiracy.

22. The Court erred in enjoining Interstate Circuit, Inc., from enforcing or attempting to enforce any provision in its license agreement with any distributor defendant requiring said distributor defendant to impose upon subsequent run exhibitors of motion picture films the restrictions as to night adult lower floor admission price or against double featuring.

23. The Court erred in enjoining Interstate Circuit, Inc., from making any contract in reference to price restriction or against double featuring with any distributor defendant.

24. The Court erred in denying the motion of each of the defendants for judgment dismissing the case at the conclusion of all the evidence, for the reasons stated upon the record in support of each of said motions.

25. The Court erred in finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, Inc., and that they agreed and conspired with each other and with Interstate Circuit, Inc., to impose the restrictions requested by Interstate Circuit, Inc., upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio, because there was no evidence showing such agreement and conspiracy or evidence from which it could be legally inferred that action upon the proposals [fol. 161] made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors.

27. The Court erred in using as a basis for its finding that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon subsequent run exhibitors in the four cities named, a similarity of the provisions of the various distributors' contracts in reference to the restrictions requested by Interstate Circuit.

28. The finding of fact of the trial court to the effect that the distributor defendants agreed and conspired among

themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate Circuit upon all subsequent run exhibitors in the cities named, is not supported by the evidence, but is contrary to the evidence.

Appellants further state that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above:

[fol. 162] Title of Paper	Record Page
1. Printed Copy of Record, Form of Appeal to United States Supreme Court.....
2. Findings of Fact and Conclusions of Law Requested by Petitioner.....
3. Memorandum in support of Findings requested by Petitioner.....
4. Findings of Fact and Conclusions of Law requested by Defendants.....
5. Memorandum in support of Findings requested by Defendants.....
6. Findings of Fact and Conclusions of Law of the District Court.....
7. Defendants' Objections to Court's Findings of Fact and Conclusions of Law.....
8. Order overruling Objections to the Court's Findings of Fact and Conclusions of Law.....
9. Order of Court refusing Findings of Fact and Conclusions of Law requested by Defendants..
10. Final Decree of Trial Court.....
11. Petition for Appeal.....
12. Assignments of Error.....
13. Order allowing Appeal.....
14. Statement showing Jurisdiction of this Court under Equity Rule 12.....
15. Notice of Appeal and Proof of Service thereof.....

The printed record should also show that the original record on file contains:

1. Bonds on appeal approved by the Court on July 6th, 1938;
2. Citation on appeal;

3. Order of Court extending term in reference to this appeal;

4. Clerk's Certificate in due form.

Dated, August 8, 1938.

Thompson, Knight, Baker, Harris & Wright, Thos. D. Thatcher, Geo. S. Wright. Counsel for Appellants, Paramount Pictures Distributing Company, Inc., et al.

[fol. 163] Received carbon copy of Statement of Points to be relied upon and Designation of Parts of the Record to be printed, pursuant to Rule 13 of the Rules of the Supreme Court of the United States, in the appeal of Interstate Circuit, Inc., et al., this 9th day of August, 1938.

N. A. Townsend, Acting Solicitor General, Counsel for Respondent.

[fol. 164] [File endorsement omitted.]

Endorsed on cover: File Nos. 42,754, 42,755. Northern Texas, D. C. U. S. Term No. 269. Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., appellants, vs. The United States of America. Term No. 270. Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants, vs. The United States of America. Filed August 12, 1938. Term Nos. 269, O. T., 1938, 270, O. T., 1938.

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SUPREME COURT OF THE UNITED STATES

NOTICE OF PETITION FOR WRIT

No. 269

INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED THEATRES, INC., KARL HOBETZELLE, ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA.

No. 270

PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC., ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

STATEMENT AS TO JURISDICTION.

JOHN R. MORONEY,
Geo. S. WRIGHT,
Counsel for Appellants.

THOMPSON, KNIGHT, BAKER,
HARRIS & WRIGHT,
Of Counsel.

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STATUTE CITED.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 269

INTERSTATE CIRCUIT, INC., ET AL.,

vs.

Appellants,

THE UNITED STATES OF AMERICA.

No. 270

PARAMOUNT PICTURES DISTRIBUTING COMPANY,
INC., ET AL.,

vs.

Appellants,

THE UNITED STATES OF AMERICA.

**STATEMENT OF BASIS UPON WHICH APPELLANTS
CONTEND THAT THE SUPREME COURT OF THE
UNITED STATES HAS JURISDICTION TO REVIEW
ON APPEAL THE DECREE APPEALED FROM, AS
REQUIRED BY SUPREME COURT RULE 12.**

Pursuant to Supreme Court Rule 12, paragraph 1, Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl

Hoblitzelle and R. J. O'Donnell * file this their statement showing the basis on which said appellants contend that the Supreme Court has appellate jurisdiction to review on appeal the final decree appealed from herein, as follows:

1. The Supreme Court of the United States entertained jurisdiction in this cause on April 25, 1938, set aside the decree, and directed the trial court to file findings of fact and conclusions of law. The statement showing jurisdiction in this cause filed with this Court and printed is respectfully adopted here. That statement shows under the statutes recited therein that this appeal from the final decree of the District Court lies to the Supreme Court and must be taken within sixty days from the entry thereof.

2. The final decree appealed from was entered on the 9th day of June, 1938, in the office of the Clerk of the United States District Court for the Northern District of Texas, Dallas Division.

3. The application for appeal was presented to the District Judge on the 6th day of July, 1938.

4. The appeal herein is from a final decree of the said District Court in a civil case in equity brought by the United States against the defendants seeking an injunction against the defendants under the provisions of Sections 1 and 4 of the Sherman Anti-Trust Act (26 Stat. 209, as amended by 36 Stat. 1167; 15 U. S. C. A., Secs. 1 and 4) upon the ground that certain agreements entered into by the defendants contained provisions in violation of Section 1 of said Sherman Act, as amended. The Court held that said provisions violated said Act and enjoined defendants from enforcing them and from including them in any future license agreements.

* CLERK'S NOTE.—The jurisdictional statement in No. 270 is identical with that in No. 269 and is not printed.

5. The cases believed to sustain the jurisdiction of the Supreme Court are as follows :

Atlantic Cleaners & Dyers, Inc., et al., v. United States,
287 U. S. 427, 431 ;

Swift & Co. v. United States, 276 U. S. 311, 322 ;

United States v. California Canneries, 279 U. S. 553, 558 ;

and the cases cited therein.

THOMPSON, KNIGHT, BAKER,
HARRIS & WRIGHT,
JNO. R. MORONEY,
GEO. S. WRIGHT,
Counsel for Appellants,
Interstate Circuit, Inc., et al.

EXHIBIT "A".**The Court's Findings of Fact and Conclusions of Law.
Filed May 17, 1938.**

In accordance with an order from the Supreme Court and Equity Rule No. 70½, I make the following special findings of fact and conclusions of law in the above styled cause:

1. Definitions.

1. A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

2. First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality. Motion picture theatres giving first run exhibitions of feature pictures distributed by the distributor defendants will be referred to herein as first run theatres and those giving subsequent run exhibitions of such feature pictures will be referred to herein as subsequent run theatres.

3. Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

4. The words "admission price" as used herein mean a lower floor night admission price for adults.

A Class A picture is a feature picture shown in the cities of Dallas, Fort Worth, Houston or San Antonio at an admission price of 40¢ or more.

The restrictions as to admission price and against double features hereinafter referred to applied only to Class A pictures.

5. Certain of the corporate defendants will be referred to herein by abbreviated titles as follows:

<i>Defendants</i>	<i>Titles.</i>
Interstate Circuit, Inc.	Interstate
Texas Consolidated Theatres, Inc.	Texas Consolidated
Columbia Pictures Corporation	Columbia
Twentieth Century-Fox Film Corp'n.	Fox
Metro-Goldwyn-Mayer Distributing Corporation	Metro
Paramount Pictures Distributing Company, Inc.	Paramount
RKO Radio Pictures, Inc.	RKO
United Artists Corporation	United Artists
Universal Film Exchanges, Inc.	Universal
Vitagraph, Inc.	Vitagraph

6. The defendants Interstate, Texas Consolidated, Karl Hoblitzelle and R. J. O'Donnell will be sometimes referred to herein as the exhibitor defendants and the other defendants will be sometimes referred to herein as the distributor defendants.

II. *The Defendants.*

7. Interstate operates 43 motion picture theatres located in Austin, Dallas, Fort Worth, Galveston, Houston and San Antonio. It operates all of the first run theatres in these cities except one in Houston which is affiliated with Metro. In each of these cities it operates two or more first run theatres which regularly charge an admission price of 40¢ or more. In addition, it operates several subsequent run theatres in each of these cities. In all of these cities except Galveston there are other subsequent run theatres competing with Interstate's first run and subsequent run theatres.

8. Texas Consolidated operates 66 theatres, some of them first run and others subsequent run houses. These theatres are located in various Texas cities other than those in which Interstate operates theatres and in Albuquerque, New

Mexico. In some of these cities there are no competing theatres and in the leading cities of Abilene, Albuquerque, Amarillo, El Paso, Waco and Wichita Falls there are no competing first run theatres.

9. Defendant Karl Hoblitzelle is president and defendant R. J. O'Donnell is general manager of both Interstate and Texas Consolidated and they are in active charge and control of the business and operations of these two corporations. Interstate and Texas Consolidated are affiliated with each other and with Paramount.

10. Defendant Metro Goldwyn Mayer Distributing Corporation of Texas is a subsidiary of and acts as the Texas agent for Metro. Defendant Twentieth Century Fox Film Corporation of Texas is a subsidiary of and acts as the Texas agent for Fox. The other eight distributor defendants distribute motion picture films in interstate commerce throughout the United States. They solicit from exhibitors located in Texas applications for licenses to exhibit films; forward such applications to their New York offices, where they are granted; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered and redelivered to local exhibitors; and finally reship the films to laboratories maintained outside of Texas. They distribute about 75% of the total feature motion picture films which are distributed for exhibition in the United States.

11. All of the feature pictures distributed by the distributor defendants are copyrighted and each distributor defendant either is the copyright proprietor of each picture distributed by it or has the exclusive right to license its exhibition in the United States.

III. *The Conspiracy.*

12. On April 25, 1934, defendant O'Donnell addressed an identical letter (Agreed Statement of Facts, Par. 10), written on Interstate's letterhead to the Texas branch manager, located at Dallas, of each distributor defendant. The letter stated that Interstate, in contracting for pictures for the coming 1934-1935 season, would insist that any picture shown

first run in an Interstate theatre at an admission price of 40¢ or more should not be exhibited at any future time in the same city at an admission price of less than 25¢. On July 11, 1934, after defendants Hoblitzelle and O'Donnell had discussed the proposed price restriction with George Shaeffer, of Paramount in Los Angeles, California, sometime after April 25, 1934, O'Donnell sent a second letter (Agreed Statement of Facts, Par. 11), written on Interstate's letterhead, which was addressed jointly to the various Texas branch managers of the distributor defendants. In this letter he renewed and amplified his earlier demand and also demanded that any feature picture shown in a first run Interstate theatre at an admission price of 40¢ or more should not thereafter be double billed in the same city. The letter also included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢.

13. Prior to the 1934-1935 season, the licensing contracts of the distributor defendants generally provided for a minimum admission price of 15¢, although in some cases the minimum was 10¢. There is no evidence that these contract provisions were uniform or were adopted as a result of any agreement among the distributor defendants or any agreement between any of them and any of their licensees. This price restriction represented a large increase in the minimum admission price, and also contemplated that distributor defendants agree to require that subsequent run exhibitors charge the requested minimum admission price. These price restrictions was an important departure from previous practice.

14. The printed license agreement used by Vitagraph since the beginning of the 1933-1934 season has contained a provision prohibiting double billing. The regular printed forms of contract used by Metro and RKO throughout the United States for the 1934-1935 and subsequent seasons include an agreement by the licensee not to double bill, but the date of the adoption of these contract forms is not disclosed by the record. Each distributor defendant thus re-

stricting double billing was free to abandon the restriction at any time or to waive it in particular cases, whereas defendant O'Donnell proposed that the distributor defendants bind themselves by agreement to maintain such a restriction. The proposed restriction upon double billing constituted a novel and important departure from prior practice.

15. The branch managers, upon receipt of the letters referred to in paragraph 12, notified their home offices. The branch managers themselves had no authority to agree to the proposed restrictions and in the negotiations which followed with representatives of Interstate with reference to contracts for the 1934-1935 season each distributor defendant was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas. Four of the eight branch managers could find in their files no correspondence whatever relating to the letters from defendant O'Donnell. Of the correspondence found in the files of the other four Dallas offices, in one instance the correspondence was not introduced in evidence. In each of the other three instances hostility to or criticism of the proposed restrictions was expressed. In one instance the branch manager wrote that "a policy of this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money." A letter of a representative of another distributor defendant stated: "They are automatically trying to set up a model arrangement for the United States without giving us anything to say about it." A letter from a representative of a third distributor defendant advised that defendant O'Donnell was "making some unfair demands" and imposing conditions "of which he is a flagrant violator."

16. During the summer of 1934 defendants Hoblitzelle and O'Donnell, representing Interstate, conferred at various times with the representatives of each distributor defendant. In the course of these conferences all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more and there were five cities,

Austin, Dallas, Fort Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions only in four of these cities, Dallas, Fort Worth, Houston and San Antonio. Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run theatres in Austin in the 1934-1935 season, but in the two following seasons, it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio.

17. Metro and Paramount incorporated the agreement to impose restrictions in their written contracts with Interstate for the 1934-1935 season. The other distributor defendants carried out the agreement without embodying it in their written licensing contracts with Interstate for the 1934-1935 season. The provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors varied slightly in language or phraseology, but the substance of the restrictions imposed by each distributor defendant was the same.

18. None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction as to the admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934.

It is agreed, however, that no demands were made in behalf of the defendant, Texas Consolidated, upon the dis-

tributor defendants for the imposition of said restrictions for the seasons 1935-1936 and 1936-1937.

19. The president of an organization composed of and representing independent exhibitors in Texas, after learning of the restrictions, called a meeting of the exhibitors affected and a committee was appointed to endeavor to persuade defendant Hoblitzelle to waive the proposed restrictions. The committee was given a hearing but met with no success. Defendant O'Donnell, who was aware of the hostility of the independent exhibitors to the restrictions, asked for and was given an opportunity to address a convention of their organization. The restrictions were strongly opposed by "independent" exhibitors, that is, those who are not affiliated with any distributor defendant.

20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer good will of independent exhibitors generally. The more nearly unanimous the action of the distributor defendants in imposing restrictions, the greater the benefit that would be derived by Interstate.

21. The distributor defendants did not call as witnesses any of the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials.

22. From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not on one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

23. Hoblitzelle and O'Donnell, with their large interests in and managements of Interstate and Texas Consolidated, discussed among themselves the demand for an inclusion of two restrictions in all contracts that they were to make with defendant distributors on and after 1934-35. Hoblitzelle consulted his attorney and O'Donnell wrote the first letters hereinbefore mentioned on April of that year. Shortly after those letters were written, each was in California during meetings of at least some of the defendant distributor executives, and there then followed the demand later of July, 1934, heretofore mentioned. These discussions and these demands appear to have originated with Hoblitzelle and O'Donnell. Not with the distributor defendants. Such restrictions appeared to be advisable and imperative from the standpoint of Hoblitzelle and O'Donnell to their own interests as first and subsequent run exhibitors in the towns mentioned and as beneficial to the distributor defendants. The Hoblitzelle and O'Donnell interests were the largest purchasers of pictures in the covered area from the distributor defendants. Hoblitzelle and O'Donnell interests were active competitors with many subsequent run houses in the cities shown in these findings.

24. By 1934 the cost of operation of theatres and the cost of production of class A feature pictures had been steadily increasing. The cost of feature pictures distributed by the distributor defendants, ranged from \$150,000.00 to \$2,500,000.00. First run revenue had not kept pace with this increase.

IV. *The Effect of the Conspiracy.*

25. Prior to the 1934-1935 season most of the independently operated subsequent run theatres in Texas charged an admission price of 15¢ or 20¢ and it was also customary to double bill, either on certain days in the week or as occasion required. The restrictions imposed by the distributor defendants upon subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio caused some of said exhibitors, in order to be able to obtain pictures subject to the restrictions, to increase their admission price to 25¢, either generally or when pictures subject to the restrictions were shown, and have prevented these exhibitors from double billing any of such pictures. Practically all of the exhibitors who have so increased their admission price would not have done so but for the restrictions imposed by the distributor defendants. The restrictions imposed by the distributor defendants have caused other subsequent run exhibitors who were unable or unwilling to accept the restrictions to be deprived of the opportunity to exhibit any of the pictures subject to the restrictions, the best and most popular of all new feature pictures. The effect of the restrictions upon the low-income members of the community patronizing the theatres of these exhibitors was to withhold from them altogether the best entertainment furnished by the motion picture industry.

26. The restrictions imposed by the distributor defendants have increased the income of Interstate by attracting to its first run theatres charging an admission price of 40¢ or more patrons who, if the pictures shown at such theatres were later exhibited in the same city at a theatre charging an admission price of less than 25¢ or as part of a double feature program, would view these pictures at such other theatres. The attendance thus deflected from subsequent run theatres to Interstate's first run theatres has reduced the income of subsequent run exhibitors and there is no evidence that such loss in income has been offset by the higher scale in admission prices which, because of the restrictions, some of the subsequent run theatres have adopted. Since the license fees which the distributor defendants charge Interstate for exhibiting feature pictures in its first run

theatres are generally based upon a percentage of Interstate's receipts from these pictures, the increased income which Interstate has received because of the restrictions has also increased the income of the distributor defendants.

27. Defendant Hoblitzelle sought legal advice before he began crusading for these contracts. The attorney advised him that since distributors were copyright owners, they would have a right to enter into such stipulation with his company.

Conclusions of Law.

1. The court has jurisdiction of this cause under the provisions of the act of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies."

2. All of the distributor defendants by acting pursuant to a common plan and understanding in imposing the restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-1935 and seasons subsequent thereto, suggested by Interstate, Hoblitzelle and O'Donnell, engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

3. All of the distributor defendants (with the exception of Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas), by acting pursuant to a common plan and understanding in imposing the restrictions against double featuring suggested by Interstate, Hoblitzelle and O'Donnell, upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the season 1934-1935 and seasons subsequent thereto, entered into and engaged in a combination and conspiracy in restraint of trade and commerce with Interstate, Hoblitzelle and O'Donnell, and with each other.

4. Said combination and conspiracy among the defendants restrained interstate commerce in motion picture films, that is, it restrained the rental and shipment, in the course of interstate commerce, of motion picture films by and be-

tween the distributor defendants and subsequent run exhibitors.

5. Said combination and conspiracy effected an unreasonable restraint of interstate commerce in that it constituted an agreement by those having a substantial monopoly of the best of all available feature pictures (1) to impose upon certain subsequent run exhibitors, customers of the defendant distributors, uniform and restrictive provisions in their exhibition contracts, and (2) not to enter into exhibition contracts with, that is, to boycott, any of these exhibitors unable or unwilling to accept such contract provisions.

6. The restraint of interstate commerce effected by the united exercise by the distributor defendants of their individual monopolies respecting the exhibition of their copyrighted feature pictures is not within any privileges or immunities conferred by the copyright law.

Apart from the combination and conspiracy referred to in paragraphs 2 and 6 inclusive of these conclusions I reach the following conclusions regarding certain provisions of each of the various license agreements involved:

7. Said provisions as to minimum night adult admission price appearing in the license agreements between all of the distributor defendants and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

8. The provisions against double featuring appearing in the license agreements between all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), and subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

9. Such provisions as bind the respective distributors to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear

in the license agreements between any or all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

10. Such provisions as bind any or all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, as appear in the license agreements between said distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, restrain trade and commerce in feature films and are illegal and void.

11. Each and every agreement, whether oral or written, between all of the distributor defendants and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the distributor defendants agree to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

12. Each and every agreement, whether oral or written, between all of the distributor defendants, (except Vitagraph, Inc., Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn-Mayer Distributing Corporation of Texas), and Interstate, for the seasons 1934-35 and subsequent thereto, wherein the said distributor defendants agree to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, is illegal and void.

Such undue and unreasonable restraint of interstate commerce is not within any privilege or immunity conferred upon the distributor defendants by the copyright law since the restraint was the product, not solely of the exercise of each defendant distributor's copyright privilege, but of a combination between it and Interstate fixing the terms upon which the distributor defendant would grant to competitors of Interstate license to exhibit certain feature pictures after Interstate's license privilege to exhibit these pictures had expired.

13. The petitioner is entitled to an injunction restraining all of the distributor defendants from enforcing or attempting to enforce said restrictions as to minimum night adult admission price against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining all of the distributor defendants (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), from enforcing or attempting to enforce said restrictions against double featuring against subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

14. The petitioner is entitled to an injunction restraining Interstate from enforcing or attempting to enforce provisions in its agreements, oral or written, with all of the distributor defendants, binding such distributor defendants to impose said restrictions as to minimum night adult admission price upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio, and restraining Interstate from enforcing or attempting to enforce any provisions in its agreements, oral or written, with all of the distributor defendants, (except Vitagraph, Metro and Metro-Goldwyn-Mayer Distributing Corporation of Texas), binding said distributor defendants to impose said restrictions against double featuring upon subsequent run exhibitors in the cities of Dallas, Houston, Fort Worth and San Antonio.

15. That the petitioner is entitled to an injunction restraining all of the defendants, including Texas Consolidated, from continuing in said conspiracy in restraint of trade and commerce and from entering into any similar combination and conspiracy having similar purposes and objects.

16. Attention is respectfully called to a written opinion in this case reported in 20 Fed. Supplement, 868, not as a compliance with Rule 70½, which failure I regret, but as showing substantially these same findings.

In Chambers, at Dallas, May 17, 1938.

(Signed)

WM. H. ATWELL,
United States District Judge.

JOHN
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Office - Supreme Court, U. S.

DEC - 5 1938

CHARLES ELMORE DROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM—1938

No. 269

INTERSTATE CIRCUIT, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 270

PARAMOUNT PICTURES DISTRIBUTING
COMPANY, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

GEORGE S. WRIGHT,
Solicitor for All Appellants.

THOMAS D. THACHER,
Solicitor for Distributor Defendants-Appellants.

JOHN R. MORONEY,
RICHARD H. DEMUTH,
Of Counsel.

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Argument:

Point I. A licensee of the first run exhibition of a copyrighted motion picture photoplay has the legal right to obtain from the licensor thereof a covenant that the granted right of first run exhibition shall not be impaired or destroyed by a subsequent exhibition of the photoplay at an admission price of less than 25¢ or as part of a double feature program.

A distributor, the owner of a copyrighted motion picture photoplay, acting independently of any other distributor, has the legal right to agree with a first run exhibitor to include either or both of the restrictions here in question in subsequent run license agreements 31

Point II. The decree must be reversed insofar as it enjoins separate agreements between each of the exhibitor defendants and each of the distributor defendants, not acting in concert with any other distributors, to impose restrictions necessary for the protection of their mutual interests in the copyright reward 42

Point III. The court's inference in Finding 22 that the distributor defendants agreed and conspired among themselves to take uniform action on the proposals made by Interstate Circuit, and that they agreed and conspired with each other to impose the restrictions requested by Interstate, is unsupported by the preceding Findings 12 to 21 upon which it is expressly predicated, and is contrary to the stipulated facts and the undisputed evidence	43
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Supreme Court of the United States

OCTOBER TERM—1938

INTERSTATE CIRCUIT, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 269

PARAMOUNT PICTURES DISTRIBUTING
COMPANY, INC., *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 270

BRIEF OF APPELLANTS.

Opinion Below.

The opinion of the court below (R. I, 229)* is reported in 20 F. Supp. 868. The opinion of this Court upon a former appeal remanding the case with directions to the District Court to state its findings of fact and conclusions of law is reported in 304 U. S. 55.

* The record now before the Court is in two parts. The first part, which is the record which was before the Court upon a former appeal, is designated as "R. I"; the second part, which contains the proceedings after the first appeal, is designated as "R. II".

Jurisdiction.

The Statement filed under Rule 12 shows that this suit was brought by the United States under the Sherman Anti-Trust Act, which provides for direct appeal to this Court from the final decree of the District Court. 32 Stat. 823, 36 Stat. 1167, 15 U. S. C. A. § 29. Probable jurisdiction of this appeal was noted by this Court on October 10, 1938.

Statutes Involved.

Section 1 of the Sherman Anti-Trust Act, approved July 2, 1890, 26 Stat. 209, 15 U. S. C. A. § 1, as amended August 17, 1937, 50 Stat. 693, and Section 1(a) and (d) of the Copyright Act, approved March 4, 1909, 35 Stat. 1075, 17 U. S. C. A. § 1, are set forth in the appendix, pages 70-71, *infra*.

Definitions of Terms Used.

A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

First run means the first exhibition of a picture in a given locality and subsequent run means a subsequent exhibition of the same picture in the same locality.

A Class A picture is a feature picture which is shown in the cities of Dallas, Fort Worth, Houston or San Antonio first run at a lower floor night adult admission price of 40¢ or more.

Double featuring or double billing is the showing of two feature pictures on the same program at the same admission price.

Admission price, unless the context otherwise indicates, means night lower floor adult admission price.

Questions Presented.

This case involves the validity under the Sherman Anti-Trust Act of agreements made by individual distributors of copyrighted motion picture photoplays with a first run exhibitor to insert in license agreements with subsequent run exhibitors a provision that any feature picture shown first run by the first run exhibitor at an admission price of 40¢ or more should not thereafter be shown subsequent run in the same city at an admission price of less than 25¢ or as part of a double feature program.

The questions presented are:

(1) Whether the inclusion by a distributor, acting independently of any other distributor, of either or both of such restrictions in its subsequent run licenses, pursuant to agreement with its first run licensee, is within the protection of the Copyright Act or is in violation of the Sherman Act.

(2) Whether the inference by the court below of conspiracy among the distributor defendants may legally be inferred from the findings of fact upon which it is expressly predicated when such findings are read in the light of facts established by the agreement and stipulation of the parties and by the undisputed evidence.

(3) If such inference is supportable, whether the decree must nevertheless be reversed because of the restraint it permanently imposes upon individual action in the absence of conspiracy or agreement among competing distributors.

(4) Whether the restrictions unreasonably restrain interstate trade or commerce within the provisions of the Sherman Anti-Trust Act.

Statement.

This action was commenced by the Government in the United States District Court for the Northern District of Texas, Dallas Division, to enjoin alleged violation by the defendants of the Sherman Anti-Trust Act. The principal defendants are Interstate Circuit, Inc., a first and subsequent run exhibitor in six Texas cities, and Texas Consolidated Theatres, Inc., a first and subsequent run exhibitor in other cities in Texas and New Mexico, and eight motion picture distributing companies (hereinafter sometimes referred to as "distributor defendants").* Karl Hoblitzelle and R. J. O'Donnell, President and General Manager respectively of both Interstate Circuit and Texas Consolidated Theatres, are also defendants to the bill.

The amended petition charged all of the defendants with having engaged in a combination, conspiracy and agreement to restrain trade and commerce in motion picture films and to monopolize or attempt to monopolize the exhibition of such films in Texas and New Mexico in violation of the Sherman Anti-Trust Act (R. I, 6). The

* The eight distributor defendants are: Paramount Pictures Distributing Company, Inc. (herein called "Paramount"), Vitagraph, Inc. (herein called "Vitagraph"), R. K. O.-Radio Pictures, Inc. (herein called "RKO"), Columbia Pictures Corporation (herein called "Columbia"), United Artists Corporation (herein called "United Artists"), Universal Film Exchange, Inc. (herein called "Universal"), Metro-Goldwyn-Mayer Distributing Corporation (herein called "Metro"), and Twentieth Century-Fox Film Corporation (herein called "Twentieth Century"). Metro-Goldwyn-Mayer Distributing Corporation of Texas, a subsidiary of and the Texas agent for Metro, and Twentieth Century-Fox Film Corporation of Texas, a subsidiary of and the Texas agent for Twentieth Century, are also named as defendants.

alleged combination, conspiracy or agreement is defined in paragraphs 25, 26 and 27 of the petition (R. I, 6-7), the allegations of which may be summarized as follows:

(1) that the exhibitor defendants, in order to strengthen their monopoly in first run exhibition of feature films and to further their attempts to monopolize the subsequent run exhibition of feature films in certain cities in Texas formed a plan or conspiracy to induce the distributor defendants to include a 25¢ admission price and a double feature restriction in subsequent run license agreements, and in furtherance of such plan or conspiracy, advised the respective representatives of the distributor defendants that unless they would insert such restrictions in subsequent run licenses, they, the exhibitor defendants, would no longer attempt to maintain a night adult admission price of 40¢ or more for first run exhibition of each feature film thereafter licensed from the distributors; and

(2) that upon receipt of said advices from the exhibitor defendants the distributor defendants agreed to join in the plan or conspiracy and to impose the restrictions, and did impose them upon subsequent run exhibitors of their feature pictures in furtherance of the plan or conspiracy.

There are no allegations that the distributor defendants agreed or conspired among themselves to enter into agreements with the exhibitor defendants or to impose the restrictions upon subsequent run licensees.

As we shall show, the court below departed from the Government's theory of action and predicated decision primarily upon a finding that "the distributor defendants agreed and conspired among themselves to take uniform action upon the proposal made by Interstate". Finding No. 22, R. II, 56.

The answer of each defendant denied under oath that it had joined in any combination, conspiracy or agreement in restraint of trade or to monopolize trade or commerce.

Each contends that the license agreements made by the distributor defendants with Interstate Circuit were made without any agreement or conspiracy among the distributor defendants as to the action which they would individually take upon the proposal made by Interstate, and that the provisions of these agreements with respect to admission prices and double features were in all respects valid agreements under the copyright laws of the United States and were not in violation of the Sherman Anti-Trust Act.

The case was tried on an agreed statement of facts and oral testimony. By stipulation, evidence at the trial was limited to proof not inconsistent with any fact contained in the agreed statement of facts (R. I, 48). Accordingly, the facts stipulated are to be taken as established.*

After trial, the District Court entered a decree granting the plaintiff injunctive relief (R. I, 242-246). The decision was accompanied by a written opinion (R. I, 229) which expressed the view of the District Court that it was a violation of the Sherman Anti-Trust Act for any distributor, acting independently, to agree with Interstate Circuit to impose the restrictions.

On appeal to this Court, the decree was set aside because of the failure of the District Court to make findings of fact and conclusions of law in conformity with Equity Rule 70 $\frac{1}{2}$, and the cause was remanded with directions to the court below to state its findings and conclusions (304 U. S. 55).

The court below has now made special findings of fact and has inferred that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate to impose the restrictions and that they agreed and conspired with Interstate to impose them. The court concluded as a matter of law that the restrictions imposed upon subsequent run licensees pursuant to the conspiracy effected an unreasonable

* Throughout this brief a reference to the agreed statement of facts will be indicated by the letters A. S.

able restraint of interstate commerce, and that even apart from any conspiracy or agreement among the distributor defendants, it was a violation of the Sherman Act for any distributor, acting independently, to impose either or both of the restrictions pursuant to individual agreement between it and Interstate Circuit (R. II, 50-62). The court did not find that the exhibitor defendants, in requesting the restrictions, had the illegal purpose of attempting to monopolize or to strengthen a monopoly, or that any agreement made by any of the distributor defendants was part of a plan or conspiracy to monopolize or to strengthen a monopoly.

A decree was entered which not only enjoined performance of all agreements which had been made but went so far as to enjoin each and every distributor defendant, whether acting singly or in concert with others, from hereafter agreeing with Interstate Circuit as part of the terms of a first run license agreement that such distributor would impose upon subsequent run licensees any restrictive price or double feature provisions whatever. The same injunction ran against license agreements with Texas Consolidated, although but one of the distributors had agreed with this exhibitor to impose any restrictions upon subsequent run licensees and the court had not found any conspiracy among any of the distributor defendants to impose any restrictions requested by Texas Consolidated (R. II, 77-79).

In 1934, Interstate Circuit acquired in receivership proceedings in the Federal Court all of the exclusively first run theatres in Dallas, San Antonio, Fort Worth, Austin and Galveston and all of the exclusively first run theatres in Houston, except one, and also a number of subsequent run theatres in these cities (A. S. par. 20, R. I, 79-80).

Among the theatres thus acquired by Interstate Circuit are the finest theatres in the state, with the most modern

and efficient equipment and every convenience, including the best sound equipment which can be bought, fire comfortable seats and air-conditioning (R. I, 183, 184). Their individual seating capacity far exceeds that of any other theatres in the state (*id.*). Their lower floor night adult admission prices range from 40¢ to 50¢ (A. S. par. 7, R. I, 53-58). These theatres are referred to in the testimony as Class A theatres. Interstate Circuit also acquired in the receivership proceedings several other less elaborate and smaller first run theatres, admission to which costs 25¢ to 35¢ (*id.*).

With the single exception of one theatre in Houston there were not then, and there are not now, any other theatres in any of the cities in which Interstate Circuit operates of sufficient capacity and equipment to show Class A pictures first run downtown and in any manner to approach the film rental paid by the Interstate Class A houses, because the competing theatres are small, old-fashioned and of an obsolete type (R. I, 184).

In addition to its first run business, Interstate Circuit owns 22 subsequent run theatres in the six cities in which it operates. There are 53 competing subsequent run theatres in these six cities (A. S. pars. 7, 20, R. I, 53-58, 80).^{*} There are approximately 921 motion picture theatres in the State of Texas, of which Interstate Circuit operates approximately 60 (R. I. 53-58, 226).

^{*} In Dallas, Interstate operates 6 subsequent run theatres and there are 21 competing theatres. In Houston, Interstate operates 5 subsequent run theatres and there are 10 competing theatres. In San Antonio, Interstate operates 5 subsequent run theatres and there are 8 competing theatres. In Fort Worth, Interstate operates 3 subsequent run theatres and there are 11 competing theatres. In Galveston, Interstate operates 1 subsequent run theatre, and there are no theatres operated by others except a theatre for Negroes. In Austin, Interstate operates 2 subsequent run theatres and there are 3 competing theatres (A. S. par. 7. R. I, 53-58).

Because of its ownership and operation of these theatres, Interstate Circuit was by far the largest and most valuable customer of each of the distributor defendants in each of the six cities where it operated. License fees for first run exhibition of feature pictures received from Interstate Circuit, which are generally based upon a percentage of the gross receipts, aggregated between 70% and 75% of the total license fees for such pictures received by the distributor defendants from all exhibitors in these cities (A. S. par. 4, R. I, 52).^{*} This was primarily due to the fact that the average film rental of Interstate Circuit for first run exhibition in its Class A theatres was from \$1,500 to \$5,000 per picture and in its other first run theatres from \$150 to \$500 per picture, whereas the average subsequent run rental in the same location for the same pictures was from \$20 to \$30 per picture (A. S. par. 4, R. I, 52, 179).^{**} Furthermore, the rentals paid by Interstate for subsequent run exhibition of Class A pictures were greater by four or five times per picture than the rentals paid by the other subsequent run exhibitors, Interstate paying from \$100 to \$150 per picture whereas, as above stated, the average subsequent run rental was from \$20 to \$30 (*id.*; R. I, 197).^o

The success of Interstate Circuit and of each of the distributor defendants necessarily depends upon successful first run exhibition. The success of first run exhibition in turn depends not merely upon the quality

^{*} In those few cases where the agreement between Interstate Circuit and a particular distributor was on a flat rental basis, the license fee was arrived at by approximation of what the gross receipts would be based upon past experience on pictures of the same type and agreement upon a flat fee measured by a percentage of the estimated receipts (R. I, 168).

^{**} Expressed in terms of total license fees, Interstate Circuit paid \$944,452.85 to the distributor defendants for first runs during the 1934-1935 season and \$133,366.73 for subsequent runs, whereas the total amount of license fees paid by all other exhibitors in the six cities involved was \$369,594.72 (A. S. pars. 5, 6, R. I, 52-53).

of the picture shown but upon the attractiveness, comfort and seating capacity of the theatre in which it is exhibited. The finer theatres must obviously demand higher admission prices to meet higher costs of investment and operation. Consequently their success necessarily depends upon some protection against the competition of cheap subsequent run exhibition in theatres where the same costly pictures shown in the first run house are shown with frequent changes during the week and two features on the same bill for a single admission of one-third the price charged by the first run house. This is particularly true when the first run theatres not only pay fifty times the rental on each picture but show it on a single bill for a whole week and spend approximately \$1,000 a week on advertising which redounds to the benefit of the subsequent run exhibitors, who have practically no advertising costs (R. I, 162-163).

Not only did Interstate Circuit, as first run exhibitor, have to pay higher license fees and advertise at great expense, but it was also required by the distributors to exhibit certain of their pictures in its Class A theatres and to charge therefor a minimum 40¢ admission price or account for the difference (R. I, 168).^{*} While for years prior to 1934 there had also been admission price restrictions in subsequent run license agreements, the usual minimum price required to be charged at that time was only 15¢ (R. I, 193). Moreover, while Interstate Circuit, paying license fees of from \$1,500 to \$5,000 per picture, could afford to play only one Class A picture for its 40¢ or 50¢ admission price, subsequent run exhibitors, paying license fees of \$20 or \$30 for precisely the same picture, were able to show it in conjunction with another feature picture for an admission price of 15¢.

^{*} Hoblitzelle stated, in explaining the reasons for Interstate's request for restrictions (R. I, 168): "My position is that if I have to charge forty cents and pay the rental I cannot let them be shown subsequently for less than twenty-five cents, without hurting my business."

By the Spring of 1934, as stated by the trial court, cheap subsequent run admission prices and double featuring of Class A pictures were destroying Interstate Circuit's first run earning capacity (R. I, 236, 161-165). Pictures exhibited first run at an admission price of 40¢ or more were being exhibited a short time thereafter at a 10¢ or 15¢ admission price (R. I, 177-178). There was, moreover, a tremendous increase in the cost of operating its theatres (R. I, 167, 176). At the same time it was being met with demands for increased rentals from the distributors because of their greatly increasing costs of production (R. I, 161). Pictures that had cost \$600,000 were then costing \$1,000,000 or more (R. I, 176) and the cost of feature pictures distributed by the distributor defendants ranged from \$150,000 to \$2,500,000 (A. S. par. 16, R. I, 79).

Confronted by this situation, it was imperative for Interstate to take action to protect its business. Without any prior communication with any distributor defendant, O'Donnell on April 25, 1934, wrote each distributor defendant as follows (A. S. par. 10, R. I, 62-63):*

"INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas

APRIL 25, 1934.

GENTLEMEN:

As the present season is drawing to a close, we want to go on record with your organization in notifying

* Prior to the writing of the letter of April 25, 1934 Interstate Circuit consulted its attorney and was advised that under the copyright law it, as licensee of a copyrighted motion picture photoplay, would have the right to contract with the licensor for the exclusive right to show the photoplay and had the lesser right to contract with such licensor that the photoplay shown by Interstate Circuit at a stipulated admission price should not be subsequently shown at a price less than that agreed upon between Interstate Circuit and such licensor (R. I, 163).

you that we would like to discuss the purchase of subsequent runs in Dallas, Fort Worth, Houston, San Antonio, Austin and Galveston, for your product.

We also want to go on record that we will expect certain clearance next season as regards our first run programs which are presented at a minimum price of 40¢ or more. In these situations, we are going to insist that subsequent run prices be held to a minimum scale of 25¢.

As an example, we feel that if we are to continue to pay outstanding first run film rentals for 'A' houses such as the Palace Theatre, Dallas, these same pictures must not be exhibited in the subsequent runs at less than 25¢ at any future time. We also want you to bear in mind that we are operating second and subsequent run theatres in most of these towns and it is quite possible that we will have additional subsequent run theatres.

The writer would like to discuss this with you as soon as possible."

On July 11, 1934, O'Donnell addressed the following letter to each of the following representatives of each of the distributor defendants (A. S. par. 11, R. I, 63-64):

"INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas

JULY 11, 1934.

MESSRS. J. B. DUGGER

HERBERT MACINTYRE

SOL SACHS

C. E. HILGERS

LEROY BICKEL

J. B. UNDERWOOD

E. S. OLSMYTH

DOAK ROBERTS

GENTLEMEN:

On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it

would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase product to be exhibited in its 'A' theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on 'A' pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and

selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.*

The writer will appreciate your acknowledging your complete understanding of this letter."

The precise nature of Interstate Circuit's proposal should be noted. Its demand was not that all pictures should be limited to a 25¢ subsequent run admission price and to single feature exhibition; it was simply that the more expensive Class A pictures, for which the producers had to receive larger license fees and which were shown first run at a minimum admission price of 40¢, should be protected against cheap subsequent run exhibition in the same city. Mr. Hoblitzelle explained his request as follows (R. I, 163-164):

"In 1934 I thought it necessary for the protection of my business to request these restrictions. In order to meet the demands for the increased rentals, on the part of the distributors, and realizing at the same time, one of the reasons for the decrease in their rentals, was the effect upon the first run exhibition of pictures in big theatres, by the indiscriminate offering to the public good and bad and indifferent pictures, at more or less the same price, that the solution for us was to segregate these pictures, and those pictures of merit, which in the vast majority of cases cost a great deal of money to produce, should be protected first by being put in the best theatres at forty cents or more, and that thereafter should be protected in the subsequent runs for the reason then, and now, that the exhibiting of these same films,

* This paragraph, requesting a price restriction in the Rio Grande Valley, refers to part of the territory in which Texas Consolidated Theatres operates and in which Interstate Circuit does not operate. No such restriction was ever imposed by any distributor. It was very different from the price restriction proposed by Interstate Circuit. We discuss it at pages 50-54, *infra*.

subsequently at a very reduced admission price, is bound to affect not only the admissions of the first run theatre, but the rentals that that first run theatre can pay the producers. And that without a sufficient revenue . . . we would not have those better class pictures available for the public, and for ourselves. It was on that basis and no other basis, that, other than to protect our first run theatres, this conclusion was reached and that these restrictions were asked."

And further (R. I, 167):

"The reason that I requested each distributor to insert a provision against double billing was that I thought it would injure my business in income and in the eyes of the public."

The Class A pictures for which the restrictions were requested constituted approximately 50% of the total number of feature pictures released by the distributor defendants in Texas,* and considerably less than 50% of the total number of feature pictures released by all the distributors of motion pictures in Texas (A. S. par. 2, R. I, 50-51). In addition to the Class A pictures, there were more than enough unrestricted feature pictures produced each year to fill the programs of all independent exhibitors who might not desire to exhibit the more expensive product at an admission price commensurate with its cost (A. S. par. 3, R. I, 51, 198). Each

* For the 1934-1935 season, the distributor defendants released 348 feature pictures, of which 179 in Dallas, 157 in Fort Worth, 178 in San Antonio and 92 in Houston were Class A pictures. For the season 1935-1936, the distributor defendants released 364 feature pictures, of which 190 in Dallas, 174 in Fort Worth, 194 in San Antonio and 92 in Houston were Class A pictures (R. I, 51). In addition 119 feature pictures were released by other distributors in 1934, 169 feature pictures in 1935 and 134 in 1936 (R. I, 50).

of the distributors did license such pictures to such exhibitors without restriction (A. S. par. 7, R. I, 55-58).*

Interstate Circuit did not "demand" the restrictions in the sense of threatening to cease business with any non-complying distributor. Its position, as taken in the foregoing letters and subsequently amplified in the negotiations with each of the distributor defendants, was that unless the particular distributor involved would agree to impose the restrictions, Interstate Circuit could not afford to play the feature pictures of that distributor in its Class A first run theatres, at which admission prices of 40¢ or 50¢ were charged, but would be forced to exhibit such pictures in its lower class first run theatres at which admission prices of 25¢ or 35¢ were charged (R. I, 167).

The proposal thus presented to each distributor the choice of first run exhibition of its best pictures in Class A theatres with the proposed restrictions upon subsequent run exhibition, or of first run exhibition of such pictures in second class theatres without such restrictions upon subsequent run exhibition. Financial considerations constrained the same action by each distributor. The minimum film rental for Interstate's Class A theatres was \$1,500 per picture (A. S. par. 4, R. I, 52); the minimum rental for its other first run theatres, in Dallas for instance, was from \$150 to \$400 per picture (R. I, 179). The minimum first run rental of any distributor unwilling to negotiate upon the terms proposed by Interstate was, therefore, certain to be decreased in Dallas alone by at least \$1,100 for every picture which, but for this fact, would have been shown in one of Interstate's Class A theatres (R. I, 167). Similar losses would necessarily occur in the other cities.

* The District Court's conclusion of law No. 5 that the distributor defendants agreed with Interstate Circuit "not to enter into exhibition contracts with, that is, to boycott any [subsequent run] exhibitors unable or unwilling to accept" the restrictions (R. II, 59) is palpably in error.

The price and double feature restrictions were not only advantageous to Interstate Circuit and to each of the distributor defendants, but if rejected by any one of the individual distributors would have been destructive of its business interests. This is shown in the agreed statement of facts as follows (A. S. pars. 18, 19, R. I, 79):

"18. The exhibition subsequent run of feature motion pictures at a night adult admission price of less than 25¢ which have been exhibited first run at a night adult admission price of 40¢ or more in the same city will reduce the income of the theatre giving such first run exhibition and the total license fees of the distributor of such motion pictures.

19. The exhibition of a feature moving picture of a distributor defendant on the same program and as a part of the program with any other feature moving picture reduces the value of such moving picture and reduces the total license fees of the distributor of such moving picture."

Since the license fees for first run exhibition amounted to between 70% and 75% of the total license fees received per picture, the inevitable loss of first run revenues of any distributor rejecting the proposals could hardly be offset by increased revenues from subsequent run exhibition.

Accession to Interstate Circuit's request was therefore of great advantage to each of the distributor defendants and refusal of the request would have proved disastrous to any non-complying distributor (R. I, 194).

It was not shown that any representative of any distributor defendant had any discussion or communication with any representative of any other distributor defendant regarding the proposals of Interstate Circuit. Each of these distributors was in active competition with the others (R. I, 193-194). Each was concerned in procuring a commitment from Interstate to exhibit in its Class A theatres

as many of its feature pictures as possible and to know what percentage of first run exhibition receipts would be paid to it as licensee. Until these fundamental terms could be agreed upon there could be no agreement with respect to the proposed restrictions with Interstate, much less with all the other distributors who were equally concerned with procuring for themselves and in competition with each other exhibition in Interstate's Class A theatres upon the most favorable terms.

The terms of the license agreements, which included the question of how many pictures should be exhibited in Interstate's Class A theatres, the percentage rental for those pictures and the proposed restrictions upon their subsequent exhibition, were the subject of separate negotiations between each distributor and Interstate Circuit. As a result of these negotiations, Interstate separately consummated contracts with each of them for the exhibition of their pictures during the 1934-1935 season. No one was present at any negotiations with any distributor except Hoblitzelle and O'Donnell, representing Interstate Circuit, the branch manager of the distributor involved, and a superior sales official from outside the state (R. I, 167, 175-181). In none of the separate negotiations did O'Donnell condition agreement with the distributor involved upon the action of the other distributors or any of them (R. I, 182). To the contrary the negotiations clearly reflect the independence of the action taken by each distributor.

The first negotiations were commenced with Paramount, with which Interstate Circuit was affiliated, shortly after the letter of April 25th was sent out (R. I, 175). Dugger, Paramount's branch manager, expressed approval. Thereafter O'Donnell and Hoblitzelle discussed the restrictions with George Schaeffer, President of Paramount, during a Paramount convention in Los Angeles, no representative of any other distributor being present at the discussion

(R. I, 175).^{*} In June, Unger, Southern Division Manager of Paramount, came to Dallas and, after two or three days' discussion, he too was convinced that the proposal was for the best interests of his company. He then and there agreed on behalf of Paramount to accede to Interstate's request (R. I, 175).

Vitagraph (R. I, 176-177) was the next distributor with whom Hoblitzelle and O'Donnell negotiated. This company already had a definite rule against double featuring and a 20¢ minimum price restriction for subsequent runs of its "A" pictures (R. I, 201-202). Interstate, after discussion of the terms of the license agreement, including the restrictions, had no difficulty in persuading Vitagraph to consent to its proposal (R. I, 177). The negotiations were conducted for the company by Jacks, District Manager, and Lesserman, Assistant to the General Sales Manager (*id.*).

Metro (R. I, 177-178) was represented in its negotiations by Bickle, its branch manager, Connors, Eastern and Southern Sales Manager, and Kessnich, Southern Sales Manager. Metro had already adopted provisions in its license agreements for previous seasons restricting double featuring. After a meeting of one or two days, Metro received from Interstate a commitment of a certain number of pictures to be exhibited in Interstate's Class A theatres and agreed to impose the price restriction for three years and to make this agreement part of its three-year written contract with Interstate. No contract to impose any restrictions for more than one year was made by any other distributor.

^{*} The statement of the District Court in its Finding 23 (R. II, 57) that Hoblitzelle and O'Donnell were "in California during meetings of at least some of the defendant distributor executives, and there then followed the demand letter of July, 1934" is entirely misleading. The only testimony in the record is that Hoblitzelle and O'Donnell discussed the restrictions in Los Angeles with Schaeffer alone.

The negotiations of Interstate Circuit with Twentieth Century (R. I, 178-179) extended from July to October. Twentieth Century was represented by Hilgers, its Texas agent, and Ballance, its Southern representative. At each meeting Hoblitzelle and O'Donnell stressed the need for the restrictions if the increased rentals demanded by Twentieth Century were to be paid. Finally, after Ballance had discussed Interstate's proposal many times with his New York office, a one-year deal was concluded, including an agreement to impose the restrictions.

Universal (R. I, 179), represented by Oldsmith, its branch manager, and Graham, its Southern Sales Manager, refused to impose the restrictions unless Interstate would agree to play more Universal pictures in its Class A houses at top admission prices. The negotiations, lasting from July to November, were eventually consummated in a deal whereby Interstate agreed verbally that if Universal produced more fine pictures they would be shown in Class A theatres and Universal agreed that its pictures so shown should become subject to the price and double feature restrictions.

Columbia's concern was the same as that of Universal (R. I, 181). Moscow, the Southern representative, who negotiated the deal together with Underwood, the branch manager, told O'Donnell that the restrictions might be detrimental to Columbia unless more of its pictures could be shown in Interstate's "A" theatres. O'Donnell declined to increase Interstate's commitment in advance, but verbally agreed to show more of Columbia's pictures in Class A theatres if more fine pictures were produced and this distributor thereupon agreed to the restrictions.

The next negotiations were between Interstate Circuit and United Artists, represented by Roberts, its Branch Manager, and Gold, its Southern Sales Manager (R. I, 180). From the inception of its business United Artists had pursued in its own interest the policy of producing a few highly specialized and very fine pictures each year which

it declined to license for exhibition except upon agreement by the exhibitor that its pictures would not be shown for an admission price of less than 25¢ or as part of a double bill (R. I, 180, 213). This company licensed each of its pictures for exhibition individually upon the best terms it could negotiate (R. I, 180). In the negotiations between Interstate and United Artists, Gold stated that this had always been his company's policy and that what Interstate was proposing met that policy exactly. Naturally he subscribed to the 25¢ minimum price and the elimination of double features (R. I, 180).

The negotiations with RKO (R. I, 180) were protracted. This distributor refused to commit itself on the proposed restrictions until other terms were agreed upon, particularly the amount of rentals to be paid for its pictures, which necessarily included the number of its pictures to be exhibited in Class A theatres. The parties could not agree until late in October, when a verbal understanding was reached on the price restriction alone. RKO had already established a definite policy in its own interest against double features (R. I, 76).

The testimony of Hoblitzelle (R. I, 167)—characterized by the trial court as one of the finest characters in the City of Dallas (R. I, 240)—and of O'Donnell (R. I, 175-182), representing Interstate, and of Oldsmith (R. I, 153), Dugger (R. I, 198), Jacks (R. I, 201), Roberts (R. I, 213) and Underwood (R. I, 217), representing distributor defendants, establishes the fact that in these negotiations the distributors acted independently of one another and that there was no communication or concerted action between any of them.

The agreements made by the distributor defendants with Interstate for the 1934-1935 season which resulted from these negotiations were by no means uniform and there was no similarity of form or of expression from which an agreement among the distributors might be inferred. Four of the distributors (Metro, Vitagraph, RKO

and United Artists) already had a definite policy against double featuring and United Artists, in addition, had a fixed sales policy of a minimum 25¢ admission price. The court below gave partial recognition to this situation by limiting relief against Metro and Vitagraph to an injunction against enforcing the price restriction but failed so to limit the injunction against RKO and United Artists. Metro's agreement to impose the price restriction upon subsequent run exhibitors was included in its written license contract with Interstate (R. I, 67); the agreements made by the other distributors, as outlined above, were verbal and were not embodied in the written license agreements later executed by each of these distributors with Interstate (A. S. par. 12, R. I, 65-78). Paramount and Twentieth Century, however, inserted in their written license contracts with Interstate a provision imposing both of the restrictions upon Interstate itself, as subsequent run exhibitor (R. I, 65, 68). Metro's agreement was for a period of three years, whereas the agreements with the other distributors were only for a single season. Metro's agreement applied only to Dallas, Fort Worth and San Antonio, while Paramount's agreement covered Houston and Galveston as well, and Twentieth Century's and Universal's agreements broadly covered all six cities (A. S. par. 12, R. I, 65-78).

Similar diversity characterizes the 1935-1936 and 1936-1937 agreements with Interstate. Provision for the 25¢ price restriction appeared in the written license agreements of Twentieth Century, Universal, Paramount and United Artists with Interstate Circuit; no such provision was contained in the written license agreements of RKO, Vitagraph and Columbia (A. S. par. 12, R. I, 65-78). The 1935-1936 contract of Universal covered five of the six cities in which Interstate Circuit operated; a memorandum of agreement between Twentieth Century and Interstate Circuit for the same season covered all six cities (A. S. par. 12, R. I, 65). The Paramount agreement for that season related only to Dallas, Fort Worth, Houston and

San Antonio (A. S. par. 12, R. I, 69), while the terms of the United Artists agreement broadly covered all six cities (A. S. par. 12, R. I, 74; see p. 56, *infra*).

The agreed statement of facts shows the provisions of the subsequent run license agreements of the respective distributors.* These provisions are worded so differently that they could not give any support to an inference of agreement among the distributors to impose the restrictions because of similarity of language or phraseology (*cf.* Finding 17, R. II, 55).

Twentieth Century's contract provided (R. I, 65):

"Exhibitor agrees as to any feature picture shown first run at a night adult admission price of 40¢ or more on the lower floor, not to show such picture subsequent run at less than 25¢ night adult admission price on the lower floor, nor as a part of a double feature program."

Columbia's contract provided (R. I, 70):

"Any feature receiving first run downtown, general night admission of 40¢ or more, not to be exhibited for less than 25¢, general night admission, and is not available for double program exhibition. In the event the exhibitor is unable to charge 25¢ for features receiving 40¢ general admission first run downtown, he has the privilege of eliminating these pictures from this contract, provided the theatre does not exhibit any other product at an admission price of 25¢."

RKO's restriction against double featuring was (R. I, 76):

"The exhibitor agrees that none of the feature photoplays licensed hereunder will be exhibited at the same performance with any other feature photoplay as a part of a double feature program, and a breach of this provision will be considered a material breach of this agreement."

* Twentieth Century, R. I, 65; Metro, R. I, 67; Paramount, R. I, 68; Columbia, R. I, 70; Universal, R. I, 72; United Artists, R. I, 74; RKO, R. I, 76; Vitagraph, R. I, 76.

Two of the distributors, acting solely in their own interests and not in pursuance of any conspiracy with any other distributor, imposed the price and double feature restrictions upon Interstate itself as a subsequent run licensee in Houston of features shown first run by Loew's Houston Company, a subsidiary of Metro and a first run competitor of Interstate. Metro protected the first run exhibition of its pictures by Loew's Houston Company for the seasons 1934-1935 and 1935-1936 by an exclusive license to that Company, and for the season 1936-1937, by including in Interstate's subsequent run license agreement for Houston the 25¢ price restriction and the restriction against double featuring (A. S. par. 12, R. I, 67). For the seasons 1934-1935 and 1935-1936 United Artists, in the exercise of its independent business judgment, licensed 12 of its fine, specialized pictures to Interstate's competitor at Houston and protected the first run exhibition of those pictures by including in Interstate's subsequent run license for such pictures the 25¢ price restriction and the restriction against double featuring (A. S. par. 12, R. I, 74-75). Interstate complied with the restrictions imposed in Houston by Metro and United Artists and exhibited in its subsequent run theatres 42 Metro pictures and 12 United Artists pictures (*id.*).

None of the distributor defendants granted the request made on behalf of Texas Consolidated in O'Donnell's letter of July 11th that pictures exhibited in its Class A theatres in the Rio Grande Valley at 35¢ should be restricted to subsequent runs in the Valley at 25¢ (A. S. par. 12, R. I, 65-78). Paramount, which was affiliated with Texas Consolidated, did agree to and did impose for the single season 1934-1935 a 25¢ price and a double feature restriction upon pictures shown first run by Texas Consolidated at a 40¢ admission price in the Cities of Albuquerque, New Mexico, El Paso, Tyler, Amarillo, Waco and Wichita Falls, Texas, none of these cities, however, being in the Rio Grande Valley (R. I, 68-69). No demands were made upon any of the distributor defendants on

behalf of Texas Consolidated for any restrictions whatever for the 1935-1936 and 1936-1937 seasons (R. II, 55) and no such restrictions were in force when the action was commenced or at the time of trial in any part of the territory in which Texas Consolidated operates theatres as a result of any demand or request on the part of Texas Consolidated (R. I, 78).

The District Court found that the restrictions proved to be advantageous to each of the distributor defendants, and likewise advantageous to Interstate's first run business (Finding 26, R. II, 58). Their effect was therefore to protect the reward of the copyright and the value of the granted right of first run exhibition.

This protection, however, was not at the cost of the subsequent run houses. During the time that the restrictions were in force, Interstate Circuit exhibited all Class A pictures in its subsequent run theatres at an admission price of 25¢ and each of its subsequent run theatres operated at an increased profit (R. I, 190-191). During this time, the number of subsequent run competing theatres in the four cities increased and no subsequent run theatre retired from business (R. I, 174, 118).

It may be that attendance was deflected from subsequent run theatres to Interstate's first run theatres, but there was nothing to show that the income of subsequent run exhibitors was thereby reduced except in a few poorly equipped and ill furnished theatres.* The fact is that if a theatre which previously charged a 15¢ admission price raised its admission price to 25¢, the attendance would have to decrease by more than 40% before its gross income would be adversely affected. The uncontradicted testimony shows that well equipped subsequent

* There were 49 subsequent run theatres competing with Interstate in the four key cities. Twenty subsequent run exhibitors in these cities testified and a large majority of their theatres operated at a profit (R. I, 118, 121, 134, 140, 142, 150, 198, 204, 207, 208, 211).

run competing theatres, suitable for exhibition of Class A pictures, operated at increased profits after the restrictions were adopted (R. I, 118, 134, 140, 142, 204, 207, 208, 211).

There were only five small theatres in the four cities which refrained from licensing Class A pictures, three in Houston, one in Fort Worth and one in Dallas (R. I, 110, 113, 121, 128, 198). Of the three theatres in Houston, two of which had no balconies, one could not persuade its patrons to pay "two bits in a 15¢ joint" (R. I, 110), another found that restricted and unrestricted pictures had about the same drawing power in that locality (R. I, 115) and the third licensed unrestricted pictures from all the distributor defendants and had a very prosperous operation for the three years immediately prior to the date of the trial (R. I, 121). The one theatre in Fort Worth which did not license Class A pictures exhibited only pictures of other distributors. This theatre was located four blocks away from a much finer theatre under the same management which exhibited Class A pictures at a profit (R. I, 127). In Dallas the one theatre which refrained from licensing Class A pictures had been operating for about sixteen years charging 10¢ admission. It licensed unrestricted pictures from some of the distributor defendants and some from other distributors. It had no difficulty in procuring sufficient pictures to change its program four times a week. It continued to charge 10¢ admission and had a successful operation. The restrictions did not affect its business (R. I, 198).

In all the cities there were many subsequent run theatres having balconies where any member of the community could see all of the Class A pictures in the balcony for not more than 15¢ admission. Furthermore, these pictures could be seen in any theatre having an afternoon exhibition for not more than 15¢ matinee lower floor admission price.

The restrictions against double featuring had direct relation to price, the practice being to show two features

for the price of one. But even so, this practice was unpopular with the public because of the inordinate length of the programs and the showing of inferior pictures on the same program with good ones (R. I, 119, 170, 184, 205).*

The only effect of the price restriction upon the public was that persons unwilling or unable to pay more than 15¢ for motion picture entertainment could not, during the evening, view from an orchestra seat the most expensive product of the industry—pictures ranging up to two and one-half million dollars in cost. As against this normal condition incident to all commercial intercourse in which cost is a determining factor of price, it is agreed that unless first run exhibition is protected by the imposition of the restrictions upon subsequent run exhibition, a profitable return cannot be derived from these costly motion pictures. Under these circumstances, the requirement that persons desiring to see Class A pictures from an orchestra seat during an evening performance should pay an admission price which is commensurate with the cost of such pictures does not appear to be unreasonable.

Specification of Errors.

1. The District Court erred in concluding as a matter of law that it was a violation of the Sherman Act for an individual distributor defendant, acting independently of any other distributor, to agree with its first run exhibitor that it would include in its license agreements with subsequent run exhibitors a provision that copyrighted motion picture photoplays distributed by it, which were exhibited first run by the exhibitor in certain cities at an admission price of 40¢ or more, should not be exhibited

* One exhibitor only testified that he made more money when he double billed, but a moment before this exhibitor had testified that 1935, when both restrictions were in effect, was the banner year in his business (R. I, 150).

subsequent run in the same city for an admission price of less than 25¢ or as part of a double feature program. (Assignment of Errors 44-47, 49-52, R. II, 93-95, 110-113.)

2. The District Court erred in concluding as a matter of law that the price and double feature restrictions imposed by the distributor defendants upon subsequent run exhibitors pursuant to agreement with Interstate Circuit were not within the protection of the Copyright Act and were illegal and void restraints of interstate trade and commerce. (Assignment of Errors 42, 43, 48, 54, R. II, 93, 94, 96, 110, 111, 113.)

3. The District Court erred in inferring (Finding 22, R. II, 56) that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio. (Assignment of Errors 28, 29, 31, 32, 53, R. II, 90, 91, 96, 107, 108, 113.)

4. The District Court erred in drawing any inference of an agreement among the distributor defendants to grant the request of Interstate (Finding 22, R. II, 56) from the facts recited in Findings 12 to 21. (Assignment of Errors 17-20, 27-29, R. II, 87-90, 104-107.)

5. The District Court erred in finding as facts those facts stated in Findings 10, 12, 13, 15, 17, 19, 20, 21, 23, 25 and 26 to which error has been assigned, and in overruling the defendants' objections to such findings of fact. (Assignment of Errors 7-9, 11, 14, 15, 19, 20, 27, 30, 33, 34, R. II, 85-91, 102-108.)

6. The District Court erred in failing and refusing to find as facts facts established by the stipulation and agreement of the parties and facts established by un-

disputed and unimpeached testimony. (Assignment of Errors 10, 12, 13, 16-18, 21-26, 31, 35, 36, R. II, 85-91, 102-109.)

7. The District Court erred in concluding as a matter of law that the distributor defendants, by acting pursuant to a common plan and understanding in imposing the restrictions, engaged in a combination and conspiracy in restraint of trade and commerce in violation of the Sherman Anti-Trust Act. (Assignment of Errors 37-41, R. II, 92-93, 109-110.)

8. The District Court erred in granting any injunctive decree. (Assignment of Errors 1-6, R. II, 83-84, 100-102.)

9. The District Court erred in granting an injunction against the making of any agreement between any distributor defendant, not acting in concert with any other distributor, and Interstate or Texas Consolidated to impose any price or double feature restriction. (Assignment of Errors 3, 5, 55, 56, R. II, 84, 96, 101-102, 111.)

Summary of Argument.

The insertion of the price and double feature restrictions in subsequent run license agreements was for the benefit of the distributor, owner of the copyrighted motion picture photoplay, and Interstate Circuit, the first run licensee. Therefore, each distributor defendant, acting independently of all of the other distributors, had the right to include either or both of the restrictions in subsequent run license agreements, pursuant to agreement for first run exhibition with Interstate Circuit. Such action is within the lawful exercise of the monopoly granted by the copyright law and is not in violation of the Sherman Act.

Regardless of any question of agreement among the distributors to grant Interstate's request, that part of the

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decree enjoining all agreements with reference to subsequent run price or double feature restrictions between Interstate Circuit or Texas Consolidated and each distributor defendant, acting independently of all other distributors, must be reversed.

The findings of the court upon which it relied to support its inference that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate Circuit, and that they agreed and conspired with each other and with Interstate Circuit to impose the restrictions requested by Interstate, when read in the light of the agreed statement of facts, do not support such inference.

The so-called instances of "unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted", relied upon by the court to support its inference of agreement among the distributor defendants, were either contrary to the stipulated facts or were the inevitable result, not of agreement but of impelling business reasons which constrained each distributor, acting without contractual restraint and solely in its own individual interest, to comply with Interstate Circuit's request.

There is no evidence of any communication between any distributor defendant and any other distributor defendant relative to the imposition of the restrictions. All of the testimony relevant to this issue shows that there was no agreement or conspiracy among the distributors to grant Interstate Circuit's request. This testimony is neither impeached nor contradicted. Thus, the Government having failed to introduce *prima facie* evidence of unlawful agreement, its lack of proof cannot be supplied by the absence of witnesses, and the court's inference of conspiracy is unwarranted.

In any event the injunction was unwarranted because the restrictions do not unreasonably restrain interstate trade or commerce.

ARGUMENT.

POINT I.

A licensee of the first run exhibition of a copyrighted motion picture photoplay has the legal right to obtain from the licensor thereof a covenant that the granted right of first run exhibition shall not be impaired or destroyed by a subsequent exhibition of the photoplay at an admission price of less than 25c or as part of a double feature program.

A distributor, the owner of a copyrighted motion picture photoplay, acting independently of any other distributor, has the legal right to agree with a first run exhibitor to include either or both of the restrictions here in question in subsequent run license agreements.

Entirely apart from any combination or conspiracy between the distributor defendants the court concluded as matter of law that the price and double feature provisions in the individual license agreements were not within any privileges or immunities conferred by the Copyright Law and were illegal and void restraints upon interstate trade and commerce (Conclusions of Law, 7 to 12, incl.,* R. II, 60-61). The decree which has been entered not only en-

* Each of these conclusions of law is introduced by the following statement: "Apart from the combination and conspiracy referred to in paragraphs 2 to 6 inclusive of these conclusions I reach the following conclusions regarding certain provisions of each of the various license agreements involved" (R. II, 59).

joins the performance of all agreements which have been made but goes so far as to enjoin each and every distributor defendant, whether acting singly or in concert with others, from hereafter agreeing with Interstate Circuit or Texas Consolidated that such distributor would impose upon subsequent run licensees any restrictive price or double feature provisions whatever (R. II. 78-79).

In view of this state of the record it becomes necessary to consider, at the outset, the validity of the individual license agreements, unaffected by the question of conspiracy among the distributor defendants.

A distributor defendant, owner of a copyrighted motion picture photoplay, has the statutory right:

(1) to grant to its licensee an exclusive right to exhibit a picture in any given territory and for any period of time within the term of the copyright; and

(2) to attach to its license agreement with its first run exhibitor any condition or covenant that has reasonable relation to the reward of its copyright for its protection or for the protection of the first run exhibitor.

The agreed statement of facts and the undisputed evidence show that each of the covenants as to subsequent run admission price and against double featuring has a direct and positive relation to the reward of the copyright and to the protection of the granted right of first run exhibition (R. I, 79, 163-164).

Under the Constitution, Art. I, Sec. 8, Congress has power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the *exclusive** right to their respective writings and discoveries * * *." In the exercise of this constitutional power Congress passed the Copyright Law, providing that

* Unless otherwise indicated italics used in this brief are ours.

any person complying with the law should have *the exclusive right*—

“(a) To print, reprint, publish, copy and vend the copyrighted work;

• • • • •

“(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof, by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever • • •.”

A motion picture photoplay is a “work” under Section 1 of the Copyright Act, and the words “any transcription or record thereof” include motion picture films and prints which are used in exhibiting the copyrighted play. The copyright owner thus has an exclusive right not only to exhibit the copyrighted motion picture photoplay in any manner or by any method whatsoever but also the exclusive right to make the only means by which the photoplay may be exhibited. *Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co.*, 59 F. (2d) 70 (C. C. A. 1).

The principle that the proprietor of a copyright may by restrictive covenant protect the granted right of exhibition is well established. In *Manners v. Morosco*, 252 U. S. 317, *Manners*, the author of the play “Peg of My Heart,” granted to *Morosco* an exclusive license to produce, perform and represent “the said play in the United States and Canada.” *Manners* sought to enjoin *Morosco* from representing the play in motion pictures in violation of *Manners*’ copyright. *Morosco* claimed his license was broad enough to include the right to represent the play by spoken drama and in motion pictures. The courts

below held that the license to Morosco included the right to present the play in motion pictures and denied the injunction. This Court, through Mr. Justice Holmes, said (p. 326):

"The Courts below based their reasoning upon the impossibility of supposing that the author reserved the right to destroy the value of the right granted, however that right may be characterized, by retaining power to set up the same play in motion pictures a few doors off with a much smaller admission fee. We agree with the premise but not with the conclusion. The implied assumption of the contract seems to us to be that the play was to be produced only as a spoken drama * * *. As was said by Judge Hough in a similar case, 'There is implied a negative covenant on the part of the [grantor] not to use the ungranted portion of the copyright estate to the detriment, if not destruction, of the licensee's estate. Admittedly if Harper Bros. (or Klaw & Erlanger, for the matter of that) permitted photo-plays of Ben Hur to infest the country, the market for the spoken play would be greatly impaired, if not destroyed.' *Harper Bros. v. Klaw*, 232 Fed. Rep. 609, 613. The result is that the plaintiff is entitled to an injunction against the representation of the play in moving pictures, but upon the terms that the plaintiff also shall abstain from presenting or authorizing the presentation of the play in that form in Canada or the United States."

The covenant implied by this court for the protection of Morosco, the licensee, restrained Manners, the licensor, from competing or permitting any one else to compete with Morosco by exhibiting "Peg of My Heart" in motion pictures anywhere in the United States or Canada. The provisions of the contracts involved in the case at bar are express covenants on the part of the licensor not to use the ungranted portion of the copyright estate so as to authorize subsequent run exhibition at less than 25¢ and as part of a double feature program in the same city to the detriment or destruction of the licensee's estate.

Admittedly, if the distributor permitted pictures shown first run by Interstate Circuit at 40¢ or more to be subsequently exhibited in the same city at less than 25¢ or as a part of a double feature program, the value of Interstate's granted right of first run exhibition would be greatly impaired, if not destroyed (A. S. pars. 18, 19, R. I, 79; R. I, 163-164).

Restrictive provisions designed to protect the granted portion of a patent estate, like those designed to protect the granted portion of a copyright estate, have been held valid by this Court. In *Bement v. National Harrow Co.*, 186 U. S. 70, the owner of a patent granted a license to manufacture and sell patented articles, and agreed not to license any other person to manufacture and sell any of the patented articles. The license agreement also provided that the licensee should not sell the patented articles except at prices fixed by the agreement. In holding valid the first of these restrictive covenants, this Court said (p. 94):

"There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual *who is the licensee* * * *."

The Court likewise held valid under the Sherman Act the agreement restricting the prices at which the licensee might sell the harrows, stating (p. 92):

"But that statute [the Sherman Act] clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor."

In *United States v. General Electric Company*, 272 U. S. 476, where the validity of a license to make, use and vend patented articles was under consideration, the question, as stated by Chief Justice Taft, was (p. 488):

"Had the Electric Company, as the owner of the patents entirely controlling the manufacture, use and sale of the tungsten incandescent lamps, in its license to the Westinghouse Company, the right to impose the condition that its sales should be at prices fixed by the licensor and subject to change according to its discretion?"

The Government contended this agreement was in violation of the Sherman Anti-Trust Law. The Court held (p. 489) that the licensor "may grant a license to make, use and vend articles under the specifications of his patent for any royalty or upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure." The rule would not apply, the Court stated, where the patentee makes the patented article and sells it. Thereafter he can exercise no control over the purchaser.

Justice Taft propounded this question (p. 490):

"If the patentee . . . licenses the selling of the articles, may he limit the selling by limiting the method of sale and the price? We think he may do so, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold."

In *Carbice Corporation of America v. American Patents Development Corporation*, 283 U. S. 27, and *Standard Oil Co. v. United States*, 283 U. S. 163, this Court reaffirmed the principles declared in *Bement v. Harrow* and in the *General Electric Company* case, and in *General Talking Pictures Corp. v. Western Electric Co., Inc.*, No. 1, Oct. Term, 1938, decided November 21, 1938, it again expressly

reaffirmed the ruling in the *General Electric Company* case that a patentee may grant a license "upon any condition, the performance of which is reasonable within the reward which the patentee by grant of the patent is entitled to secure". Stating the rights of cross licensing patentees, this Court said in the *Standard Oil Company* case (p. 179):

"By virtue of their patents they had individually the right to determine who should use their respective processes or inventions and what the royalties for such use should be."

Under these principles the agreements to impose the restrictions upon subsequent run exhibitors were clearly valid because both restrictions were admittedly designed and adapted to secure to the licensor the pecuniary reward of the copyright and to protect the licensee's granted right of first run exhibition.

The right of the owner of a patent or a copyright is to exclude all from exercising his exclusive rights and he may select his licensees at will, preferring the large or the small business units and granting his monopoly to one or more or to any number as he wishes, for such reasons as may impel his choice, which no doubt under ordinary circumstances will be dictated by his desire for profit in the form of royalties. *American Equipment Co. v. Tuthill*, 69 F. (2d) 406 (C. C. A. 7). In the exercise of his monopoly granted by statute he may impose any conditions reasonably adapted to the realization of the value of his monopoly, as, for instance, by fixing the price at which the licensee may sell unpatented articles manufactured under license by patented machinery (*Straight Side Basket Corporation v. Webster Basket Co.*, 82 F. (2d) 245 (C. C. A. 2); *Murphy v. Christian Press Ass'n Pub. Co.*, 38 N. Y. App. Div. 426), and by dictating the customers to whom articles may be sold by the licensee. *Becton, Dickinson & Co. v. Eisele & Co.*, 86 F. (2d) 267 (C. C. A. 6). He may also license the public performance of copyrighted works to some licensees on more favorable terms than to others.

Buck v. Hillsgrove Country Club, 17 F. Supp. 643 (D. R. I.). He is indeed a czar in his own domain, who may sell or not as he chooses, fix such prices as he pleases, sell at one price to one person and at another price to another, and is not required to give reasons or deal fairly with those seeking to share in his monopoly. *Victor Talking Mach. Co. v. The Fair*, 123 Fed. 424 (C. C. A. 7); *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606 (N. D. Ill.).

Of course, the protection of the Copyright Act does not extend to unreasonable restraints of trade imposed pursuant to a combination, agreement or conspiracy between two or more copyright owners who have combined for the purpose of monopoly or restraint of trade. *Straws v. American Publishers' Association*, 231 U. S. 222; *Paramount Famous Corp. v. United States*, 282 U. S. 30. But in the absence of such prior agreement, combination or conspiracy, the owner of the copyright has an absolute monopoly within the field of his copyright.

The court below recognized that the distributor defendants as copyright owners had the right to give the exhibitor defendants an exclusive license to exhibit their copyrighted photoplays (R. I, 236), but concluded that the defendants had no right to make an agreement providing a lesser restraint upon licenses to subsequent run exhibitors, i. e., an agreement to insert the price and double feature restrictions in all such licenses of the same pictures. The distinction lacks foundation both in logic and authority. If an agreement completely to exclude subsequent run exhibitors does not violate the Anti-Trust Laws, an agreement to impose a far less drastic restriction upon them can likewise involve no violation.

The specific contracts involved in the case at bar were considered by the appellate courts of Texas in *Glass v. Hoblitzelle*, 83 S. W. (2d) 796, a decision of the Court of Civil Appeals. In that case, Glass, a subsequent run exhibitor in Dallas, sought to enjoin Interstate Circuit and the distributor defendants from enforcing the subsequent run price restriction and the restriction against double

featuring. Denial of an injunction was affirmed after full review on the merits, the appellate court holding that the subsequent run price restriction and the restriction against double featuring had a reasonable relation to the reward of the copyright and to the value of the copyrighted motion picture photoplays and that the anti-trust laws of Texas had no application to them. The principles applied are settled law in Texas with regard to purely intrastate transactions. *Coca-Cola Company v. State*, 225 S. W. 791.

In *Shubert Theatre Players Company v. Metro-Goldwyn-Mayer Distributing Corporation*, unreported, Jan. 30, 1936 (D. Minn.), the petitioner sought to enjoin a first run exhibitor and the eight major distributors from carrying out any agreements to the effect that pictures shown first run should not thereafter be shown at an admission price of less than 15¢ and should not be subsequently shown as part of a double feature program on the ground that said agreements were in violation of the Sherman Anti-Trust Act. The Court held each of the provisions valid. We file herewith copies of this decision.

Even if the photoplays had not been copyrighted, the agreement between an individual distributor agreeing to impose the restrictions and a first run exhibitor would still be valid. The undisputed fact is that, had subsequent run licenses been granted without these restrictions, the first run business of Interstate Circuit would have been injured (R. I, 79, 164). The agreement between Interstate Circuit and each distributor defendant was intended simply to protect the distributor in the enjoyment of profits from first run exhibition and Interstate Circuit from unreasonable interference, due to subsequent action by the distributor itself, in the enjoyment of the rights for which it was contracting. The agreements therefore fall within the principle established by the decisions of this Court that a contract containing a covenant in restraint of trade is nonetheless valid if the restraint is reasonably necessary for the protection of the right granted by the contract.

Thus the right of a vendee of a going business engaged in interstate commerce to bind his vendor not to engage in that business for a period of years in a prescribed territory, if the restriction of the vendor's right to engage in such business has a reasonable relation to the value of the business sold, is established, and such agreements do not offend the Sherman Anti-Trust Law. *Cincinnati Packet Company v. Bay*, 200 U. S. 179; see *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 67; *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C. C. A. 6); *Allison v. Seigle*, 79 F. (2d) 170 (App. D. C.); *A. Booth & Co. v. Davis*, 127 Fed. 875 (E. D. Mich.). So also, the vendor of an article to be used in a business or trade in which he is engaged may contract with the vendee that the article shall not be used so as to interfere with the vendor's business. Such a provision does not offend the Sherman Anti-Trust Law if the region in which the article is not to be used has reasonable relation to the value of the business of the vendor. See *Fowle v. Park*, 131 U. S. 88; *Oregon Steam Navigation Co. v. Winsor*, *supra*; *United States v. Addyston Pipe & Steel Co.*, *supra*; *Moore v. New York Cotton Exchange*, 270 U. S. 593; *United States v. General Electric Company*, 272 U. S. 476; *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 250, 252.

In *Cincinnati Packet Company v. Bay*, *supra*, certain steamers were sold with a stipulation that for five years the seller should not engage in operating any freight and passenger packets from Cincinnati to Portsmouth, Ohio, and intermediate points. It was claimed that this covenant was an illegal restraint of trade. Mr. Justice Holmes, in declaring the covenant valid, among other things said (pp. 184-185):

"The withdrawal of the vendors from opposition for five years is the ordinary incident of the sale of a business and good will.

"* * * The price is paid not for the vessels alone but for the vessels with the covenant.

“* * * there has been no intimation from anyone, we believe, that such a contract, made as part of the sale of a business and not as a device to control commerce, would fall within the act [Sherman Anti-Trust Act]. On the contrary, it has been suggested repeatedly that such a contract is not within the letter or spirit of the statute. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 329; *United States v. Joint Traffic Association*, 171 U. S. 505, 568, and it was so decided in the case of a patent. *Bement v. National Harrow Co.*, 186 U. S. 70, 92.”

Paraphrasing the language of Justice Holmes in the above case, the license fee paid by the Interstate Circuit was not for the right to exhibit the pictures, but for the right to exhibit the pictures *with the covenant* that the value of their exhibition should not be destroyed by subsequent exhibition as part of a double feature program or for less than 25¢ admission.

The protection given by the law to the copyright owner is greater than that afforded the seller and buyer in the cases cited above. In the former case the contracting parties are dealing with an existing statutory monopoly which may be exercised to its fullest extent so long as the monopoly granted by statute is not utilized (1) to impose restraints unrelated to the reward of the statutory monopoly, or (2) to monopolize trade in articles not covered by the statutory monopoly. It follows that a copyright proprietor entitled by statute to the exclusive exhibition right of a motion picture photoplay may in granting an exhibition right to another bind and restrain himself by any covenant which has reasonable relation to the reward of the copyright or the protection of the granted right even though such covenants directly restrain interstate commerce. The Sherman Anti-Trust Act has no application to such restraints, which under all the authorities are within the statutory monopoly of the copyright.

POINT II.

The decree must be reversed insofar as it enjoins separate agreements between each of the exhibitor defendants and each of the distributor defendants, not acting in concert with any other distributors, to impose restrictions necessary for the protection of their mutual interests in the copyright reward.

The trial court in its conclusions of law held that an individual contract between a distributor defendant, acting independently of any other distributor, and its first run licensee was in and of itself illegal (Conclusions of Law 7-12, R. II, 60, 61). Having reached this erroneous conclusion of law, the court issued an injunction the effect of which is to enjoin each of the distributor defendants from imposing any restrictions as to admission price or double featuring in furtherance of any agreement between it and Interstate Circuit or Texas Consolidated (Decree, par. 4, R. II, 78). Each and every one of the corporate defendants, including Texas Consolidated, was enjoined from entering into such agreements (Decree, par. 6, R. II, 79). The court did not find that there was any conspiracy or agreement among the distributor defendants to grant any restrictions requested by Texas Consolidated, but held that the single contract made by it with Paramount in 1934 was a combination and conspiracy in violation of the Sherman Anti-Trust Act, and enjoined Texas Consolidated from in the future engaging in any such combination or conspiracy (R. II, 62, 79).

We have shown (Point I, *supra*) that the individual license agreements were valid since the restrictions they contained were for the mutual protection of the interests

of the licensor and the licensee in the reward of the copyright. Conclusion necessarily follows that the decree must be reversed insofar as it enjoins such agreements between Interstate Circuit or Texas Consolidated Theatres and each distributor defendant, acting independently of all other distributors.

POINT III.

The court's inference in Finding 22 that the distributor defendants agreed and conspired among themselves to take uniform action on the proposals made by Interstate Circuit, and that they agreed and conspired with each other to impose the restrictions requested by Interstate, is unsupported by the preceding Findings 12 to 21 upon which it is expressly predicated, and is contrary to the stipulated facts and the undisputed evidence.

In such a case as this, where parties engaged in normal business transactions and activated by similar motives of business interest are charged with illegal conspiracy and agreement predicated upon uniformity of action, it must constantly be borne in mind that the transactions engaged in are not in themselves illegal and that in order to make out unlawful conspiracy something more than mere uniformity of action must be shown. *Frey & Son v. Cudahy Packing Co.*, 256 U. S. 208. To warrant the injunction invalidating such transactions, there must be a "definite factual showing of illegality", i. e., a clear purpose to monopolize or restrain trade. *Standard Oil Co. v. U. S.*, 283 U. S. 163, 179. Far from being symptoms of a larger combination the license agreements were but the exercise of lawful and exclusive exhibition rights

granted by statute to the proprietors of copyrighted motion picture photoplays. From the plurality and similarity of such lawful acts unlawful combination may not be inferred. *Terminal Warehouse v. Penn. R. Co.*, 297 U. S. 500, 516.

The agreements between individual distributor defendants and Interstate Circuit, lawful in themselves, were not shown to have been, as the Government alleged, part of a plan to monopolize or an attempt to monopolize. The court did not find any such unlawful purpose and the evidence shows there was no such purpose. The sole purpose and effect of the requested restrictions was to protect the exclusive exhibition rights granted by statute.

The court below predicated a finding of conspiracy solely upon an inference based upon its findings of fact numbered 12 to 21, inclusive, stating:

"From the facts set forth in findings 12 to 21, inclusive, and particularly from the unanimity of action on the part of the distributor defendants, not in one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find" etc. (R. II, 56).

Analysis of the findings in paragraphs 12 to 21 shows that there was no finding of any facts from which it can be inferred that there was unlawful agreement among the distributors to accept the proposals of Interstate or that diverse action would have been taken by them in the absence of an agreement between them to accept such proposals.

The findings in paragraphs 12 to 21, inclusive, may be summarized as follows:

12. O'Donnell's letter of July 11, 1934, was addressed to the distributors jointly. It "included a demand that any feature picture exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited in the same city at an admission price of less than 25¢" (R. II, 52-53).

13 and 14. The price restriction was an important departure from previous practice and the restriction upon double billing was a novel and important departure from prior practice. (R. II, 53-54.)

15. Three of the branch managers representing distributor defendants expressed in correspondence with their home offices hostility to or criticism of the proposed restrictions. No correspondence was found in the files of four others, and in one case the correspondence was not introduced. (R. II, 54.)

16. During the course of negotiations which occurred at various times during the summer of 1934 between Hoblitzelle and O'Donnell, representing Interstate, and representatives of each distributor defendant, all of the distributor defendants agreed with Interstate to impose both of the requested restrictions upon subsequent run exhibitors. Interstate's request covered pictures exhibited first run at an admission price of 40¢ or more. There were five cities where such pictures were exhibited and where there were competing subsequent run theatres. The distributor defendants with substantial unanimity agreed to impose, and did impose, the restrictions in only four of the cities,—excepting, however, Metro and (in 1934-1935) Universal. (R. II, 54.)

17. The provisions imposing the restrictions in various subsequent run license contracts varied slightly in language or phraseology but the substance of the restrictions imposed by each distributor was the same. (R. II, 55.)

18. None of the distributors except Paramount, and it only for the 1934-1935 season, imposed any restriction as to admission prices in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres. There is no evidence that prior to or during the

negotiations Hoblitzelle or O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934. No demands were made on behalf of defendant Texas Consolidated for the imposition of restrictions for the seasons 1935-1936 and 1936-1937 (R. II, 55).

19. When the independent exhibitors heard of the restrictions proposed by Interstate Circuit they strongly opposed them. (R. II, 55.)

20. Either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect. Adoption of the restrictions by all of the distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action the adoption of either or of both by one or more would have caused a loss of the business of subsequent run exhibitors unwilling to conform to the restrictions and of the customer good-will of independent exhibitors generally. The more nearly unanimous the action of the distributor defendants in imposing the restrictions, the greater the benefit that would be derived by Interstate. (R. II, 56.)

21. The distributor defendants did not call as witnesses the superior officials from outside the State of Texas who negotiated the 1934-1935 contracts with Interstate. The most important issue in the case was whether the distributor defendants in agreeing with Interstate to impose the restrictions acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials. (R. II, 56.)

As heretofore stated, the case was tried upon an agreed statement of facts and it was stipulated by the parties

that additional evidence bearing upon the issues might be introduced but not if inconsistent with any fact contained in the agreed statement (R. I, 48). The facts thus stipulated must accordingly be taken as true (*Hackfeld & Co. v. U. S.*, 197 U. S. 442) and findings of the court inconsistent with the facts thus established by the agreement of the parties must be rejected. *Kings County Lighting Co. v. Nixon*, 268 Fed. 143, 149, aff'd, 258 U. S. 180. Furthermore, if one would infer illegal conspiracy from similarity of lawful acts there must be accuracy in statement of the facts upon which the inference is predicated, and if the inference is inconsistent with any of the facts established by agreement of the parties it must be rejected.

Inaccuracy of statement, fundamental misconception of the stipulated facts and a failure to regard facts established by the stipulation of the parties are apparent in the court's Findings 12 to 21.

The court's findings with respect to the nature of the proposal made by Interstate reveals such fundamental misconception of the stipulated facts. The court treats Interstate's letter of July 11th as addressed to the distributors jointly and as though inviting joint action. The stipulated facts show that it was addressed to each of the representatives of each distributor, naming them (R. I, 63), and that it invited individual decision by each distributor (R. I, 64). The letter states (*id.*):

"In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices."

The court further misconceived the nature of Interstate's proposal in its statement in Finding 20 that "either of the two proposed restrictions could have been put into effect by any one or more of the distributor

defendants without putting the other into effect" (R. II, 56). O'Donnell's letter of July 11th contained Interstate Circuit's complete proposal. This letter referred to the price restriction in the letter of April 25th and then made one proposal including both restrictions. Immediately following this proposal, the letter in the above quoted paragraph advised each distributor that unless it granted this proposal including both restrictions, Interstate Circuit could not negotiate for its pictures to be exhibited in Interstate's Class A theatres at top admission prices. Of course, if a distributor wished to abandon exhibition in Interstate's Class A theatres, it could have imposed one of the restrictions without the other, but it could not comply with Interstate Circuit's proposal without agreeing to include both restrictions in its subsequent run licenses for the 1934-1935 season.

The proposal in the letter of July 11th thus presented each distributor with the alternative of imposing both restrictions, each of which the agreed statement of facts shows was to its advantage, and having its pictures shown in Interstate's Class A houses, or refusing to impose the restrictions and having its pictures shown in Interstate's second class first run houses. No distributor could possibly have afforded to suffer the loss resulting from refusal to comply with the request—a loss which, as stated above, would have amounted to a minimum of \$1,100 per picture in Dallas alone and many times that amount for the four cities involved (see p. 16, *supra*).

The court chose to ignore these obvious financial considerations which constrained the individual choice of each distributor. It made no mention whatever of the agreed fact that a refusal of either restriction would have reduced the total of all license fees received by the non-complying distributor for each picture which would otherwise have been shown in Class A theatres (see p. 17, *supra*). Its only finding concerning the business aspects

of the situation facing the distributors was the following statement in Finding 20 (R. II, 56):

"Adoption of the restrictions by all distributor defendants alike was financially beneficial to each, but in the absence of substantially unanimous action by them with respect to the restrictions, adoption of either one of the restrictions or of both by one or more individual distributor defendants would have caused such distributor defendants to lose the business of subsequent run exhibitors who were unwilling to conform to the restrictions and would have caused them to suffer a serious loss of the customer goodwill of independent exhibitors generally."

The court did not find that, in the absence of substantially unanimous action, adoption of the restrictions by one or more of the distributor defendants would have been disadvantageous to them. It found only that in the absence of substantially unanimous action adoption of the restrictions by one or more of the distributor defendants would have caused them to lose the business of subsequent run exhibitors unwilling to conform to the restrictions and to suffer a serious loss of the customer goodwill of independent exhibitors generally. The significant fact, which the court ignored, is that any such hypothetical loss was utterly insignificant in comparison with the far more serious and demonstrable loss which the stipulated facts show each distributor would have suffered if it had declined to comply with the request (see pp. 16-17, *supra*).

In considering the request, each individual distributor knew that refusal, on the one hand, meant a tremendous and certain loss of first run revenue, with a possible small increase in the business of independent subsequent exhibitors unwilling to conform to the restrictions, and that compliance, on the other hand, meant inevitable increase in first run revenue with a possible loss of some independent subsequent run business. Confronted with this choice, no possible loss of subsequent run business—the

only factor mentioned by the court—could have been considered of importance. This was true regardless of the action which any other distributor might take. Consequently, the court's finding that the absence of substantially unanimous action might have caused a loss to a complying distributor of some subsequent run business is of no probative force as indicating agreement among the distributors to take unanimous action.

Apart from what the distributor defendants *did not do*—i. e., their failure to grant the request of Texas Consolidated Theatres and to impose the restrictions in Austin—the case reduces itself to the simple fact that the most valuable customer of each distributor requested each of them to take similar action, that accession to this request, even if it should arouse hostility among some independent subsequent run exhibitors, was to the independent advantage of each distributor regardless of the action taken by the other distributors, and that each distributor therefore did accede to the request as made. No inference of conspiracy can be predicated upon these facts.

Nor can any inference of conspiracy be predicated upon the fact that the distributor defendants did not agree to impose and did not impose the price restriction requested by Texas Consolidated, quoted in full in O'Donnell's letter of July 11th as follows (R. I, 64):

“Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our ‘A’ theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors’ product, that subsequent runs should be restricted to at least a 25¢ admission scale.”

Texas Consolidated operated theatres in the Rio Grande Valley, Interstate Circuit did not.

The court in its finding of fact No. 12 (R. II, 53) mis-stated this request by finding that O'Donnell's letter

" * * * included a demand that *any feature picture* exhibited in a Texas Consolidated first run theatre located in the Rio Grande Valley at an admission price of 35¢ or more should not thereafter be exhibited *in the same city* at an admission price of less than 25¢."

Comparison of the court's finding with the actual request quoted above shows that the words italicized do not appear in the request as written. The words "any feature picture" were substituted for "all pictures," the words "or more" were added by the court's finding, and the words "in the same city" were substituted for the words "in the Valley".

These changes appearing in the court's finding distort the meaning and effect of the request of Texas Consolidated. Whether inadvertent or not, the effect of this misstatement is to indicate that the request of Texas Consolidated was similar to the request of Interstate Circuit, and thus to furnish an apparent but fictitious basis for the court's inference in Finding No. 22 that the distributor defendants agreed among themselves to grant Interstate's request because they declined the similar request of Texas Consolidated.

In considering the Texas Consolidated situation, it is important to note the exact nature of the restriction actually requested. It was not, as was the request of Interstate Circuit, that any picture shown first run at 40¢ or more should not be subsequently shown *in the same city* at less than 25¢ or as part of a double feature program. It was that any picture shown in the Rio Grande Valley at 35¢ must be restricted to subsequent runs *in the Valley* at 25¢.

The Valley is a well defined section of Texas extending 150 miles or more along the Rio Grande River from Brownsville inland. It embraces a number of counties in which, however, there are no cities comparable in size with

Dallas, Fort Worth, Houston and San Antonio. The population of these cities ranges from 163,000 to 292,000.* The cities in the Valley in which Texas Consolidated operates theatres, and the population of each as shown by the census of 1930, are as follows: Brownsville, 22,000; Harlingen, 12,000; San Benito, 10,700; McAllen, 9,000; Mercedes, 6,600; Weslaco, 5,000. None of the large cities in which Texas Consolidated operates is located in the Valley.

In operation, the effect of the restriction requested by Texas Consolidated would have been that a picture shown by it first run at Brownsville at an admission price of 35¢ could not thereafter be shown at McAllen, almost 100 miles away, at less than 25¢, and the effect would have been similar as between any two towns in the Valley. None of the distributor defendants granted this request or made any such agreement under similar circumstances anywhere.

There are no facts stipulated or any evidence to show that it was to the financial interest of any distributor to grant the request of Texas Consolidated. The agreed statement of facts and the undisputed evidence shows that it was to the financial interest of each distributor to grant the request of Interstate Circuit (see pp. 16-17, *supra*). Competition of cheap subsequent run exhibition with first run exhibition in the same city at 40¢ or more cannot be compared with competition between subsequent and first run exhibition at 35¢ in theatres located in rural communities many miles apart. There is no evidence of the disparity between the rental received for first run exhibition and that received from subsequent run exhibition in the small cities located in the Valley, and therefore the record affords no basis of judgment as to the benefit or detriment in such restrictions. The Government asked no questions of any witness concerning the situation in the Valley and the failure of the distributors to impose the restrictions there

* See note, page 57, *infra*.

was not made an issue at the trial of this case by counsel for the Government.

The impression conveyed by the District Court's Finding of Fact No. 18 (R. II, 55) that "There is no evidence that, prior to or during the negotiations with the distributor defendants, defendants Hoblitzelle and O'Donnell withdrew the demand for a price restriction in the Valley which was made on behalf of Texas Consolidated in the letter of July 11, 1934" is misleading. The fact is that there is no evidence about that "demand" at all—no evidence that it was either pressed, withdrawn, or, indeed, even mentioned again. O'Donnell testified fully about the negotiations he conducted with the distributor defendants and in his entire testimony there is no mention of Texas Consolidated's request for restrictions in the Valley. The same is true of the testimony of five branch managers of the distributor defendants who testified to the negotiations in which they participated. In view of the Government's failure to prove that the request was insisted upon and of its failure to introduce any evidence whatever about the Rio Grande Valley situation, no inference of conspiracy based on that situation can possibly be justified.

The District Court's statement in Finding 18 that "None of the distributor defendants except Paramount, and it only for the 1934-1935 season, imposed any restriction as to the admission price upon subsequent run exhibitors in cities, either in the Rio Grande Valley or elsewhere, in which Texas Consolidated operates its theatres" may convey the misleading impression that Paramount, which was affiliated with Texas Consolidated, acceded to its request. The agreed statement of facts shows that Paramount did not agree to and did not impose any restrictions in the Valley whatever; it did agree to and did impose a 25¢ admission price and double feature restriction upon subsequent exhibition in the same city of pictures shown first run by Texas Consolidated at a 40¢ admission price in the cities of Albuquerque, New Mexico,

El Paso, Tyler, Amarillo, Waco and Wichita Falls, Texas (R. I, 68). None of these cities is in the Rio Grande Valley. None of the restrictions imposed related to the subsequent run exhibition of a picture shown first run for a 35¢ admission price. Thus Paramount, which was affiliated with Texas Consolidated, did not accede to the request of its affiliate for restrictions in the Rio Grande Valley, a clear indication either that the request was withdrawn or that Paramount believed the proposal was contrary to its best interests.

If any inference is to be drawn from the fact that all the distributors refused the request of Texas Consolidated, it is the inference that each distributor refused the request because it was not to its interest to grant it rather than an inference of an unlawful agreement among the distributors to grant another and different request.

Equally unjustifiable was the court's action in predicated its inference of conspiracy upon the situation in Austin. The statements in Finding-16 (R. II, 54) concerning Austin are contrary to the agreed statement of facts, and when read in the light of the facts established by stipulation of the parties give no support to the court's conclusion of conspiracy. Finding 16 reads as follows:

"Interstate's request had covered feature pictures exhibited at any first run theatre operated by it which charged an admission price of 40¢ or more, and there were five cities, Austin, Dallas, Fort Worth, Houston and San Antonio, where Interstate operated such theatres and where there were competing subsequent run theatres. The various distributor defendants, with substantial unanimity, agreed to impose and did impose these restrictions *only* in four of these cities, Dallas, Fort Worth, Houston and San Antonio. Since Metro did not grant licenses to any subsequent run exhibitor in Houston, where an affiliate of Metro operated a first run theatre, it did not agree to impose the restrictions in Houston. Universal imposed restrictions on subsequent run the-

atres in Austin in the 1934-1935 season, but in the two following seasons, it, like all the other distributor defendants, imposed restrictions only in the four cities previously mentioned. Interstate agreed to accept and subsequently observed both of the restrictions as to its own subsequent run theatres in Dallas, Fort Worth, Houston and San Antonio."

The agreed statement of facts shows that there was diversity of action among the distributors in reference to the imposition of the restrictions in Austin.

The printed license agreements of Metro, Vitagraph and RKO, wherever used, including Austin, during each of the three seasons beginning 1934-1935, contained restrictions against double featuring (A. S. par. 12, R. I, 68, 76-77).

The agreed statement of facts also shows that Universal, for the season 1934-1935, included both restrictions in its subsequent run agreements in Austin, and that for the season 1935-1936 it agreed with Interstate Circuit that both restrictions should be enforced in Austin (A. S. par. 12, R. I, 72-73).

During the first season, 1934-1935, Twentieth Century imposed the restrictions on Interstate as subsequent run exhibitor without limitation to the four cities. The agreed statement of facts shows that both restrictions were included by this distributor in all subsequent run licenses in the four large cities; it does not show that they were not imposed in Austin upon independent subsequent run licensees (A. S. par. 12, R. I, 65). However, this distributor, on September 6, 1935, executed a written memorandum of agreement with Interstate setting forth the basis of its exhibition contract for the following season. The same restrictions were to be imposed upon Interstate and the mutual obligation of the distributor to impose these restrictions upon other subsequent run licensees in Austin was expressed (*id.*). The agreed statement of facts as with respect to the prior season does not show that these restrictions thus agreed to be imposed were not

imposed in Austin. If there is any inference to be drawn from the stipulated facts, it is that they were imposed by this distributor there.

The agreed statement of facts shows that United Artists included both restrictions in its subsequent run license agreements for the season of 1934-1935 in the four cities. As in other cases it does not expressly state whether the restrictions were or were not inserted in license agreements covering exhibition in Austin (A. S. par. 12, R. I, 73-74), but it is established by the undisputed evidence that United Artists had never permitted double featuring of any of its pictures, in Austin or elsewhere, and that it had a fixed 25¢ minimum admission price for subsequent run exhibition (R. I, 180, 213). For the season of 1935-1936 this distributor agreed with Interstate that any of its pictures, wherever shown at a night adult admission price of 40¢ or more, would not be permitted to be shown subsequent run in the same town at less than 25¢, nor double featured (R. I, 73-74). This agreement included Austin since the agreed statement of facts shows that Interstate exhibited pictures first run in Austin at an admission price of 40¢ or more (R. I, 58).

As indicated above, RKO included in its license agreements for 1934-1935 a restriction against double featuring in all cities, including Austin. The agreed statement of facts shows that in addition to this restriction against double featuring RKO included the price restriction in the cities of Dallas, Fort Worth, Houston and San Antonio (R. I, 75). It does not show what price restrictions were imposed by RKO in any other cities.

The agreed statement of facts shows that Vitagraph "in licensing its pictures for subsequent runs in the cities of Dallas, Fort Worth, Houston and San Antonio" included the price restrictions, and that the double feature restriction was in all its license contracts (R. I, 76-77). The agreed statement of facts does not show what this distributor did as to the price restriction "in licensing

its pictures" for subsequent run exhibition in Austin, but does show, as indicated above, that Vitagraph included in its license agreements in all cities, including Austin, for 1934-1935 a restriction against double featuring.

It is entirely clear from these references to the agreed statement of facts that there was no substantial unanimity of action upon the part of the distributor defendants with reference to restrictions in Austin. The action was diverse in many respects; it not only fails to support the inference of conspiracy but is evidence that there was no agreement among the distributors to take uniform action upon the proposals made by Interstate.

In considering the foregoing references to the agreed statement of facts this Court should be mindful of the situation presented upon the trial of this case. The Government directed its attack against conditions existing in Dallas, Fort Worth, Houston and San Antonio.* All of the Government's witnesses were called to testify as to conditions existing in these cities. No witness was called from Austin, and no witness who was called testified regarding conditions there. There were only three subsequent run competing theatres in Austin and it was not shown that prior to the 1934-1935 season any of them charged less than 25¢ admission price or exhibited double

* Austin, with a population of 53,000, was much smaller than any of the four other cities. There were in Austin only eight theatres, three first runs owned by Interstate, two subsequent runs owned by Interstate, one of which was the finest subsequent run theatre in the city, and three subsequent runs owned by others. Dallas, with a population of 260,000, had 32 theatres, of which 21 were unaffiliated subsequent run theatres; Houston, with a population of 292,000, had 18 theatres, of which 10 were unaffiliated subsequent run theatres; San Antonio, with a population of 230,000, had 17 theatres, of which 8 were unaffiliated subsequent run theatres; Fort Worth, with a population of 163,000, had 18 theatres, of which 11 were unaffiliated subsequent run theatres (A. S. par. 7, R. I, 53-58).

features. It does appear that Interstate's subsequent run theatres in Austin regularly charged 25¢ admission (R. I, 58).

It is apparent that the agreed statement of facts was drawn primarily to present the situation in these four cities. For example, detailed statistics were agreed upon with reference to the number of Class A features shown by the various exhibitors in the four cities. This tabulation omitted Austin entirely (R. I, 51). Exhibits were attached to the agreed statement of facts showing the names of Class A feature pictures exhibited first run by Interstate Circuit, but these exhibits refer only to pictures shown in the four cities (R. I, 52). The court itself defined Class A pictures as features shown in those cities (R. II, 51). During the trial no significance was attached to what was or was not done in Austin. The selection of witnesses and the questions which they were asked were designed solely to reveal the situation in the four key cities. The argument that any importance should be attached to the fact that the defendants did not agree to impose restrictions in Austin was first suggested by the respondent's brief upon the argument of the last appeal before this Court, which in substantial identity of language is embodied in the court's finding. To support an inference of unlawful conspiracy on the situation in Austin, as the trial court now attempts to do, is virtually to deprive the appellants of an opportunity to try the issue.

The statement in Finding 17 (R. II, 55) that the provisions imposing the restrictions in the licensing contracts made by the various distributor defendants with subsequent run exhibitors "varied slightly in language or phraseology" but that each of them was in substance the same is contrary to the agreed statement of facts in that there was no similarity in language or phraseology (p. 23, *supra*). Similarity in substance necessarily resulted from the fact that the same restrictions were de-

manded of each distributor by Interstate. It follows that this finding, when reference is had to the documents themselves, is no evidence of conspiracy.

The District Court apparently placed some reliance upon its Finding 15 (R. II, 54) that some of the branch managers of the distributor defendants expressed initial hostility to the request of Interstate, quoting single sentences and phrases from three letters written by the representatives of Universal, RKO and Metro, respectively. Only one of these letters, all of which are quoted in full in the record (R. I, 152, 155, 158), expressed hostility to the restrictions imposed, and this distributor (Universal) was primarily concerned in procuring in its negotiations with Interstate the exhibition of an increased number of its pictures in Interstate's Class A theatres. Its agreement with Interstate four months later resulted from assurances upon this question and not from agreement with any other distributor (R. I, 179). The second letter, written by the local representative of Metro, far from criticizing the restrictions, criticized Interstate as unfair in suggesting restrictions which it had flagrantly violated by "playing double features in Ft. Worth, San Antonio and plenty of other situations" (R. I, 155). Metro had theretofore licensed pictures to Interstate for subsequent run exhibition under restrictions against double billing and these restrictions had been violated by Interstate Circuit (R. I, 156). It had always been the policy of Metro to eliminate double features and the immediate reaction of its Sales Manager to O'Donnell's proposal was "The idea seems to be worthwhile" (R. I, 156). The third letter, written by the representative of RKO, criticized O'Donnell's letter but expressed no opinion on the merits of the proposal (R. I, 158-159).

We do not understand how the court finds proof of conspiracy in these letters. Indeed, they seem to us to be affirmative and convincing evidence of action by the

distributor defendants without prior agreement or consent of action.

The letter of one other local representative with reference to these restrictions was produced and handed to Government counsel (R. I, 160), who failed to introduce it in evidence. Yet the court in its Finding 15 (R. II, 54) notes the failure to introduce it in evidence in a connotation which is meaningless unless the statement of the fact is intended in some way to be taken against the defendants. Indeed, Finding 15 conveys the generally erroneous impression that the representatives of the distributors were at the outset generally hostile to the plan proposed by Interstate. The finding ignores the undisputed testimony which, taken in connection with the three letters introduced in evidence, shows that only Universal and Columbia, who desired an increase in Interstate's "A" theatre commitments for their pictures, were initially hostile to the plan (R. I, 179, 181) and that the initial reaction of the representatives of Metro (R. I, 177), Vitagraph (R. I, 201), United Artists (R. I, 180) and Paramount (R. I, 175) was favorable. There is no evidence in the record, other than their eventual agreement to the plan, as to what was the initial reaction of BKO or Fox.

The court also commented in Finding 15 upon the fact that no correspondence relating to the restrictions could be found in the files of four of the eight branch managers. This lack of correspondence was fully explained. The Government's request for the correspondence came during the trial. Each of the branch managers searched their files. Four of them found correspondence and delivered it to the Government. With respect to the four who could find no correspondence, the testimony was that there probably was none because it was the general practice of the branch managers to talk to their home offices frequently by telephone (R. I, 99, 101, 102, 218).

Only the three letters were offered by the Government. The court held each letter admissible only against the

distributor writing it (R. I, 154-158). Notwithstanding this limitation upon the proof, the Government has argued that these letters are evidence of conspiracy among all of the distributor defendants. Although the court's recital of the contents of these letters in Finding 15 is not limited, the finding itself must be read subject to the limitation under which the proof was received. It certainly would not be fair to assume that the court, having ruled as it did on the trial, without further hearing accepted the recitals of these letters as proof of conspiracy.

The only other finding upon which the court's inference of conspiracy is predicated is its Finding 21 that the distributor defendants did not call as witnesses any of their superior sales officials from Atlanta, Kansas City and New York, who, together with the local branch managers, negotiated the 1934-1935 contracts with Interstate. The court stated that "The most important issue in the case was whether the distributor defendants, in agreeing with Interstate to impose the restrictions, acted pursuant to an agreement or understanding among themselves, and facts material to this issue were within the peculiar knowledge of these superior officials" (R. II, 56).

As a matter of fact, at the close of the testimony offered by the Government the only issue in the case appeared to be whether or not the individual contracts made by each distributor with Interstate were valid. The question of conspiracy among the distributor defendants not only did not appear to be the "most important issue in the case", it did not appear to be an issue at all, since it was not comprehended by the pleadings (p. 5, *supra*), the Government had introduced no evidence tending to show a conspiracy, all the affirmative testimony in the case showed that no conspiracy ever existed, and the court itself had indicated that there was no issue of conspiracy by holding that the declarations of one of the so-called co-conspirators was not admissible against the others

(pp. 60-61, *supra*). The only purpose which could have been served by calling the superior officials from outside the State of Texas would have been to have them reiterate the story of the negotiations already twice told by O'Donnell and the local branch managers. Since the credibility of these witnesses had not been impeached and since no contradictory evidence had been offered by the Government, it seemed entirely unnecessary to call additional witnesses from distant parts of the country to testify to precisely the same thing.

The reliance of the trial court upon the failure to call these witnesses in effect establishes a rule that failure to disprove a fact not proved by the plaintiff is evidence of the unproven fact. This rule is directly contrary to the decisions of this Court which establish that the burden resting upon a plaintiff to prove his case by substantive evidence cannot be met by reliance upon failure of the defendant to call witnesses. As this Court stated in the case of *Northern Ry. Company v. Page*, 274 U. S. 65, 74, the failure of the defendant to call a witness cannot be "taken as substantive evidence of any fact". See also *Mammoth Oil Co. v. United States*, 275 U. S. 13, 52.

The foregoing analysis of each of the court's Findings 12 to 21 shows that when read in the light of the stipulated facts they lend no support whatever to the inference of conspiracy in Finding 22. The "unanimity of action . . ." in many different respects wherein, apart from agreement, diverse action would inevitably have resulted" appears to be simply (1) that the distributors granted Interstate Circuit's request in the four key cities, the restrictions being, as the stipulated facts show, to the benefit of each of them, (2) that they refused the request of Texas Consolidated for a price restriction in the Rio Grande Valley which was not shown to be to their advan-

tage and which it may fairly be inferred would have been detrimental, and (3) that some of them did not agree to impose one or both of the restrictions in Austin, the reasons for such diversity of action not being shown.

The inference of unlawful agreement or conspiracy among the distributor defendants drawn by the court below is the more unjustified because it is contrary to all the testimony in this case, which is that there was no agreement among the distributor defendants. This includes the testimony of Hoblitzelle and O'Donnell, who conducted all the negotiations on behalf of Interstate, and of Oldsmith, Dugger, Jacks, Roberts and Underwood, representing distributor defendants (see p. 21, *supra*). The testimony of all these witnesses was uncontradicted and unimpeached. It is that the distributors acted independently of one another and that there was no communication or concerted action among them. The Government did not attempt to prove any communication between any distributor defendant and any other distributor defendant with respect to O'Donnell's proposal. There is, indeed, nothing in the entire record upon which an inference contrary to the testimony of the only witnesses who testified can be based. To the contrary, the entire record confirms their statements.

For example, their testimony is confirmed by the fact that Paramount agreed to impose the restrictions before O'Donnell's letter of July 11th was written (R. I, 175). Prior to that time there could have been no conspiracy among the distributor defendants to take uniform action upon the proposals of Interstate. In fact, for an appreciable time thereafter there could have been no such conspiracy even upon the theory of the court below. Letters of the distributors were offered in evidence by the Government and characterized by the court as showing hostility to the proposal by three of the distributors after the time that Paramount made its agreement (p. 59, *supra*).

The testimony of the independent action taken by the distributors is further confirmed by the fact that Metro, which agreed to impose the price restriction early in August, committed itself to this restriction for three years, although none of the other distributors agreed to impose either restriction for longer than the first year. If, as the Government has contended, no distributor would have agreed to impose the restrictions unless all the others made similar agreements, Paramount would not have made its agreement before negotiations with the other distributors had even been commenced and Metro would not have made an agreement which was to last two years longer than the duration of the agreements made by the other distributors.

In striking contrast to the action of Paramount and Metro, Columbia and Universal, after receiving the O'Donnell letter of July 11th, refused to accede to the proposal until after prolonged negotiations were successfully concluded, in October and November respectively. Each of these companies stated to Interstate four months after the Paramount agreement and three months after the Metro agreement that it would not be interested in granting the restrictions unless more of its pictures were exhibited in Class A theatres. Each of them agreed to accede to the proposal only after receiving satisfactory assurances that more of its pictures would be exhibited in Interstate's Class A theatres if it produced more fine pictures (p. 20, *supra*).

The negotiations with Twentieth Century were not completed until October. Vitagraph, on the other hand, acceded to the proposal in July, and United Artists shortly thereafter. United Artists, acting solely in its own interest and in the exercise of its independent judgment, had from the beginning of its business declined to license its pictures for subsequent run exhibition at less than 25¢ admission or as part of a double bill (R. I, 180, 213). The continuance of this practice was no evidence of conspiracy.

The nature of Interstate's proposal and the important questions which had to be resolved through negotiation between each distributor and Interstate before acceptance or rejection of the proposal were of such a nature that agreement among the distributors to take uniform action on the proposal would have been impracticable if not impossible. Inasmuch as Class A theatres could exhibit only a part of the pictures produced by all of the distributors and the amount of each distributor's license fees for the coming season depended on the number of its pictures exhibited in such theatres, each distributor was vitally concerned to know how many of its pictures would be so exhibited, and knew that each of its active competitors had the same concern. It was therefore imperative that each distributor, acting in its own interest, should agree with Interstate Circuit upon these fundamental terms before making any agreement as to the restrictions. The fact is that the consent of each distributor to Interstate Circuit's proposal was conditioned upon and coupled with a definite commitment by Interstate to exhibit a certain number of pictures in its Class A theatres. Under these conditions agreement among the eight distributors to take uniform action upon Interstate's request, inferred by the court below, could not have occurred in fact.

In *Glass v. Hoblitzelle*, *supra*, where the very conduct of the defendants upon which this suit was predicated was under review, the Texas Court of Civil Appeals found that there was no evidence of any conspiracy or agreement. Similarly, in *Shubert Theatre Players Co. v. Metro-Goldwyn-Mayer Distributing Co.*, *supra*, which involved facts almost identical with those here presented, the court held that uniformity of action by the distributors in granting a price restriction and a restriction against double billing, being consistent with the conclusion that each distributor was acting independently for his own benefit, could not support a finding of unlawful concert of action. Again, in *Rolsky v. Fox Midwest Theatres*,

Inc., decided August 5, 1936, in an unreported opinion by Judge Otis in the United States District Court for the Western Division of the Western District of Missouri, it was held that an unlawful agreement or conspiracy of motion picture distributors could not be predicated upon the fact of a change by all of the distributors in an important provision of their contracts with a first run exhibitor in a given year, such change being beneficial to each. A copy of this decision is being filed herewith.

The fact that competitors in the exercise of their own judgment follow the prices of another competitor is no evidence of agreement among them to fix or maintain prices. *United States v. Int. Harvester Co.*, 274 U. S. 693, 708-709; *United States v. U. S. Steel Corporation*, 251 U. S. 417, 448; *Cement Mfrs. Protective Ass'n v. United States*, 268 U. S. 588, 606. The fact being established in this case that each distributor took action upon the proposal of its most valued customer similar to the action taken by its competitors in the exercise of its own judgment and in its own individual interest, no inference of conspiracy may be predicated upon such similarity of action. There is indeed in the entire case no proof susceptible of an inference of conspiracy. The case is not one of conflicting inferences, but even if it were judgment would necessarily go against the Government, which bears the burden of proving conspiracy. *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 339.

Conclusion follows that the District Court's Finding 22 that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other to impose the restrictions requested by Interstate is without support in inference or evidence and the decree predicated thereon must as a matter of law be reversed.

POINT IV.

The restrictions in question do not unreasonably strain trade or commerce.

The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain appropriate freedom in the public interest, and to afford protection from the subversive or coercive influences of monopolistic endeavor. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 359. Only such contracts and combinations are within the Act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade. *Nash v. United States*, 229 U. S. 373, 376. It follows that the legality of any agreement, regulation or combination cannot be determined by the simple test as to whether it restrains competition, and the true test of legality is whether the restraint imposed is such as merely regulates, and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

In looking, as this Court has declared one must, to the facts peculiar to the business to which the restraint is applied, its condition before and after the restraint was imposed, the nature of the restraint and its effect, actual or probable, as well as its history, the evils which existed and the reasons for adopting the particular remedy, it seems entirely clear upon this record that there is no foundation, in any view of the case, for the Government's contention that there was an unreasonable restraint of interstate commerce.

The facts peculiar to the production, distribution and exhibition of motion pictures disclose the radical difference between this business and the usual type of com-

mercial transaction involving the sale of commodities. No commodities are bought or sold. Copyrighted works are produced and licensed for exhibition under terms and agreements designed to protect the interests of the licensee and of the licensor in granted rights of exhibition. We do not dispute that interstate commerce is involved (*Binderup v. Pathe Exchange*, 263 U. S. 291) but in judging the restraints here in question it must always be remembered that they are related not to the sale of goods but to the grant of exclusive rights of exhibition of copyrighted motion pictures. When the restrictions were first proposed by an important exhibitor to the distributors, cheap subsequent run admission prices and double featuring were destroying the business of both. The increased costs of production of the outstanding pictures could not be met if this condition continued because of its effect upon the total license fees received for these expensive pictures. The purpose of the restraint was to deal with this concrete business problem. There was no purpose or intent to eliminate competition between the distributors or producers of such pictures. On the contrary they remained free to compete and have always been in active competition in licensing their pictures for exhibition. The restrictions simply assured to the owner of a statutory monopoly compensation commensurate with the cost of an original copyrighted creation, and to the licensee protection against unfair and ruinous competition from subsequent licensees of the same picture. The record demonstrates that such restraints did not adversely affect the interests of subsequent run exhibitors as a whole (see pp. 25-26, *supra*).

The insignificant effect of the restraints is shown in the statement of the case (pp. 25-27, *supra*). From the circumstances there recited the generalities of the court's finding as to the effect of the restrictions (R. II, 57-58) lose all significance if the solution of the very serious problem which confronted the industry is to be viewed with any sense of reality, and the tests of illegality laid down by this Court in the *Appalachian Coals* case and the *Chicago Board of Trade* case are to be applied.

Conclusion.

We respectfully submit that the decree of the District Court should be reversed with directions to dismiss the Government's petition.

Respectfully submitted,

GEORGE S. WRIGHT,
Solicitor for All Appellants.

THOMAS D. THACHER,
Solicitor for Distributor Defendants-Appellants.

JOHN R. MORONEY,
RICHARD H. DEMUTH,
Of Counsel.

APPENDIX.

Section 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. A. § 1, as amended August 17, 1937, 50 Stat. 693, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title, as amended and supplemented: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

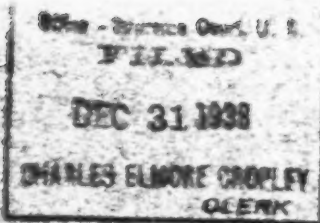
Section 1 of the Copyright Act, 35 Stat. 1075, 17 U. S. A. § 1, provides:

“Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work; • • •

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever.”

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Nos. 269 and 270

In the Supreme Court of the United States

OCTOBER TERM, 1938

**INTERSTATE CIRCUIT, INC., TEXAS CONSOLIDATED
THEATRES, INC., KARL HOBELTZELLE, ET AL.,
APPELLANTS**

v.

THE UNITED STATES OF AMERICA

**PARAMOUNT PICTURES DISTRIBUTING COMPANY, INC.,
VITAGRAPH, INC., RKO-RADIO PICTURES, INC.,
ET AL., APPELLANTS**

v.

THE UNITED STATES OF AMERICA

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF TEXAS**

BRIEF FOR THE UNITED STATES



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ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas (R. 229)¹ is

¹The record now before the Court is in two parts. The first part is the record which was before the Court upon the former appeal in this cause (Nos. 709 and 710, October Term, 1937). The second part consists of the proceedings in the cause subsequent to the first appeal. References to the first part of the record will not be italicized, and references to the second part will be italicized, i. e., R. 68, *R. 68*.

reported in 20 F. Supp. 868. The opinion of this Court upon the former appeal in this cause was reported in 304 U. S. 55.

JURISDICTION

The decree of the District Court was entered on June 9, 1938 (*R. 77*). The petitions for appeal were filed on July 6, 1938, and were allowed the same day (*R. 79, 82, 97, 100*).

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., title 15, sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 931, 936 (U. S. C., title 28, sec. 345).

QUESTIONS PRESENTED

1. Whether the evidence supports the District Court's finding that the defendants conspired with Interstate Circuit, Inc. (referred to herein as Interstate) to impose an admission-price and a double-billing restriction on subsequent-run exhibitors.

2. Whether the restrictions which were imposed effected an undue and unreasonable restraint of interstate commerce (a) if they were, as the Government contends, the product of a joint conspiracy among the distributor defendants and Interstate and (b) if they were, as appellants contend, merely the product of a series of wholly independent agreements between Interstate and the several distributor defendants.

3. Whether the restraints imposed by the restrictions are so far within privileges and immunities conferred upon the distributor defendants by the copyright law that these restraints are removed from the prohibitions of the Sherman Act. In other words, is Interstate, which owns no copyrighted pictures but only operates a chain of theatres, permitted under the copyright law to induce the distributor defendants owning a majority of picture copyrights to enter into agreements with it for the avowed purpose of effectuating a plan to impose unreasonable restraints on competing theatres?

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., title 15, secs. 1, 2, and 4), known as the Sherman Act, as amended by the Act of August 17, 1937, c. 690, 50 Stat. 693, provides in part as follows:

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

STATEMENT

Prior proceedings in the cause

This is a proceeding in equity brought by the United States under the Sherman Act to enjoin appellants from combining and conspiring to restrain interstate commerce in motion-picture films. At the trial, certain facts were stipulated and oral and documentary evidence bearing upon the issues was introduced by both parties. At the conclusion

of the trial the District Court rendered an opinion holding that the evidence established a combination in illegal restraint of interstate commerce, and entered a decree granting the United States injunctive relief. On appeal from such decree, this Court, without passing upon the merits of the questions raised by the appeal, set aside the decree and remanded the cause to the District Court because of its failure to state its findings of fact and conclusions of law as required by Equity Rule 70 $\frac{1}{2}$. *Interstate Circuit, Inc., v. United States*, 304 U. S. 55.

Following this remand the District Court made separate findings of fact and stated its conclusions of law (*R. 50-62*). It also entered a decree enjoining appellants from continuing any combination, conspiracy, or agreement such as the Court had found to exist and to be illegal, and from entering into or becoming a party to any similar combination, conspiracy, or agreement (*R. 76-79*).

*The parties defendant and the nature of their
business operations*

The proceeding in this case was instituted against two groups of defendants, those in one group being designated as the distributor defendants and those in the other as the exhibitor defendants. The distributor defendants are the appellants in No. 270 and the exhibitor defendants are the appellants in No. 269.

The distributor defendants are eight corporations² engaged in distributing motion-picture films in interstate commerce throughout the United States and the Texas agents of two of these distributors. They distribute about 75% of all first-class feature³ pictures which are distributed for exhibition in the United States (A. S.,⁴ par. 2, R. 50).

Appellants admit (Br., p. 68) that the distributor defendants, in making contracts for the exhibition of their films in Texas and in carrying out these contracts, are engaged in interstate commerce. See *Binderup v. Pathe Exchange*, 263 U. S. 291. The distributor defendants solicit from exhibitors located in Texas applications for licenses to exhibit films; forward applications received from such exhibitors to their respective New York offices, where they are acted upon; ship films from points outside of Texas to their respective film exchanges in that state, from which exchanges the films are delivered

² The names of these corporations and the abbreviated titles by which they will be referred to herein are:

Name	Abbreviated title
Columbia Pictures Corporation.....	Columbia
Twentieth Century-Fox Film Corporation.....	Fox
Metro-Goldwyn-Mayer Distributing Corporation.....	Metro
Paramount Pictures Distributing Company, Inc.....	Paramount
RKO Radio Pictures, Inc.....	RKO
United Artists Corporation.....	United Artists
Universal Film Exchanges, Inc.....	Universal
Vitagraph, Inc.....	Vitagraph

³ A feature picture is a film of five reels or more and a reel is approximately 1,000 feet in length.

⁴ The letters "A. S." will be used to designate references to the Agreed Statement of Facts.

and redelivered to local exhibitors in fulfillment of exhibition contracts; and after all such contracts have been fulfilled, finally reship the films to laboratories maintained outside of Texas (Fig. 10, *R. 52*).

The exhibitor defendants are Interstate Circuit, Inc., Texas Consolidated Theatres, Inc. (referred to herein as Texas Consolidated), Karl Hoblitzelle and R. J. O'Donnell. Hoblitzelle is the president and O'Donnell the general manager of both Interstate and Texas Consolidated, and they are in active charge of the business and operations of these corporations (Fig. 9, *R. 52*). Interstate and Texas Consolidated are affiliated with each other and with Paramount, one of the distributor defendants (*ib.*).

The 43 motion-picture theatres which Interstate operates are located in Austin, Dallas, Fort Worth, Galveston, Houston, and San Antonio. It has a complete monopoly of the first-run theatres in these cities, except for one in Houston operated by an affiliate of Metro, and the admission price³ at all but a few of its first-run theatres is 40c or more (Fig. 7, *R. 51*). It also operates several subsequent-run theatres in each of these cities, but in all of them, except Galveston, there are other subsequent-run theatres which are competitive with In-

³ As used in this brief the words "admission price" will mean, unless otherwise indicated, a lower floor night admission price for adults. Interstate first-run theatres which charge an admission price of 40c or more will sometimes be referred to as "A" theatres.

terstate's first-run and subsequent-run theatres (*ib.*). A first-run theatre is one in which feature pictures are given their first exhibition in the city where the theatre is located and a subsequent-run theatre is one which shows feature pictures which have been previously exhibited in the same city.

Texas Consolidated operates 66 theatres, some of them first-run and others subsequent-run houses. Its theatres are in various cities and towns in Texas and in Albuquerque, New Mexico, but it has no theatres in the six cities in which Interstate operates (Fig. 8, R. 51-52).

Interstate and Texas Consolidated plainly dominate the motion-picture theatre business in the cities where their theatres are located. This is demonstrated by a comparison of the license fees which they pay the distributor defendants for pictures with the license fees paid these distributors by all other exhibitors in the same cities. For the 1934-35 season this comparison shows: Interstate payments, \$1,077,819.58; payments by all other exhibitors operating theatres in the same cities, \$369,594.72; Texas Consolidated payments, \$594,863.68; payments by all other exhibitors operating in the same cities, \$47,928.22 (A. S., pars. 5-6, R. 52-53).

The restrictions on subsequent-run exhibitors requested by Interstate and Texas Consolidated

On April 25, 1934, O'Donnell wrote an identical letter on Interstate's letterhead to the Texas branch

manager of each defendant distributor stating that Interstate, in contracting for pictures for the coming 1934-1935 season, would insist that any picture shown first run in an Interstate theatre at an admission price of 40¢ or more "must not be exhibited in the subsequent runs at less than 25¢ at any future time" (A. S., par. 10, R. 62-63). On July 11, 1934, after O'Donnell and Hoblitzelle had discussed the proposed price restriction with the president of Paramount (R. 173, 175), O'Donnell sent a second letter on Interstate's letterhead to the same branch managers reaffirming his earlier request. The letter also demanded that feature pictures shown first run in an Interstate theatre at an admission price of 40¢ or more "shall never be exhibited in conjunction with another feature picture" and that any feature picture exhibited first run in a Texas Consolidated theatre in the Rio Grande Valley should not thereafter be exhibited in the same city at an admission price of less than 25¢ (Fig. 12, R. 53). The letter reads (A. S., par. 11, R. 63-64):

Messrs.: J. B. Dugger, Herbert MacIntyre,
Sol Sachs, C. E. Hilgers, Leroy Bickel,
J. B. Underwood, E. S. Olsmyth, Doak
Roberts.

GENTLEMEN: On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to

purchase produce to be exhibited in its "A" theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this "A" product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on "A" pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our "A" theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Val-

ley situation. We must insist that all pictures exhibited in our "A" theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

The admission price customarily charged by independently operated subsequent-run theatres in Texas at the time these letters were sent was either 15¢ or 20¢ (R. 105). In 17 of the 18 theatres of this kind whose operations were described by witnesses, the admission price, before the restrictions which O'Donnell proposed went into effect, was less than 25¢; in one it was 25¢ (R. 109, 113, 116, 121, 123, 127, 130, 134, 138, 139, 141, 143, 144, 147). It was also the general practice of these theatres to double bill, either on certain days in the week or with any feature picture which was weak in drawing power (R. 105, 111, 127, 144, 148). Accordingly, the change in business practice which Interstate was seeking to force upon subsequent-run exhibitors was material and substantial.

Restraints of the kind demanded by Interstate were also wholly without precedent in the industry. It is true that the distributors' contracts with subsequent-run exhibitors generally provided for a

minimum admission price of 15¢,* although sometimes the minimum was 10¢ (Fig. 13, *R. 53*), but this minimum was a matter of individual arrangement between the particular distributor and exhibitor. The distributor was always free, in the exercise of its independent judgment, to omit this contract provision in individual cases or to waive performance, whereas Interstate demanded an admission price restriction which the distributor could neither omit nor waive without violating its agreement with Interstate. Not only was the proposed constraint novel in this respect, but, what was even more important, the jump in the minimum from 15¢ or 10¢ to 25¢ was so drastic that it wholly altered its character and the scope of its application. It represented an increase in price, in one single raise, of from 66% to 150%.

Likewise, in the case of double-billing, the District Court found that the restriction proposed by Interstate "constituted a novel and important de-

* Appellants state (*Br.*, pp. 20 21, 64) that from the beginning of its business United Artists had declined to license subsequent-run exhibition at less than 25¢ admission. We submit that this somewhat overstates what the record shows. United Artists' branch manager in Dallas testified that the company, in licensing pictures for subsequent exhibition, negotiated as part of the deal an agreement upon the exhibitor's admission price; that a 25¢ admission was the company's "general practice"; and that the company "requested" and "tried to maintain" this minimum; but the witness was unable to state definitely that "we were able to get twenty-five cents admission price from all subsequent run exhibitors here in Dallas" (*R. 213-214*).

parture from prior practice" (Fig. 14, *R. 54*). While four of the distributor defendants, before or about the time of O'Donnell's demands, individually adopted the policy of including in their contract forms (used generally throughout the United States) provisions restricting double billing,⁷ these restrictions could be waived at any time by the copyright owner. None were subject to control by a third party.

The distributor defendants recognized the novel and far-reaching character of O'Donnell's proposals. Paramount's branch manager, who "had heard a good many exhibitors express themselves in connection with" this matter, admitted that the restrictions were considered "quite a startling proposition" (*R. 199*). Universal's branch manager, in forwarding O'Donnell's July letter to his home office, wrote (*R. 153*):

I am sure this will give you some idea as to how tough these fellows expect to be in the Dallas territory and it looks to me like a sales policy that should be "nipped in the bud" in New York for after all, a policy of

⁷ It had always been the policy of United Artists to prohibit double billing (*R. 180*). The contracts used by Vitagraph from the beginning of the 1933-1934 season, and the forms of contracts used by Metro and RKO in the 1934-1935 and subsequent seasons, contained provisions against double billing (Fig. 14, *R. 53*). The record does not show the dates on which Metro and RKO adopted these contract forms (*ib.*).

this sort is extremely dangerous to everyone concerned and cannot help, in the long run, but cost us all plenty of money.

RKO's branch manager in forwarding the same letter to his home office wrote (R. 158-159):

In view of the fact that this letter requests us to set up a definite sales policy as outlined by them, I would appreciate your advising me if under our national sales policy, we would be within our rights to agree to any such set-up even if we agreed with them. They are automatically trying to set up a model arrangement for the United States without giving us anything to say about it.

The letter from Metro's branch manager forwarding the July letter to the company's general sales manager said (R. 155):

In my opinion Bob is making some unfair demands, imposing conditions on us of which he is a flagrant violator. This has particular reference to the fifth paragraph of his letter, as he is playing double features in Ft. Worth, San Antonio and plenty of other situations.

These statements are most significant as evidence that the change was drastic. They reflect the reaction of the managers on the spot in Texas. Some not very successful attempts were made to explain away these utterances (R. 153-154, 156-157, 159). However, the defendants declined to call the only persons who could have authoritatively explained

them away, to wit, those in actual control of company policy.*

Thus the reaction of even the distributor defendants was surprise and doubt, bordering on hostility. The reaction of those injured, the independent subsequent-run exhibitors whose competition it was intended to curb was, complete consternation. They saw oppression, even ruin, before them. The president of a state-wide organization of independent exhibitors in Texas, upon learning of the proposed restrictions, called a meeting of the exhibitors affected (R. 104, 106). A committee of three was appointed to visit Hoblitzelle to persuade him to modify his oppressive demand. Concerning their unsuccessful interview with Hoblitzelle, one of the committee members testified (R. 106):

We advised Mr. Hoblitzelle that the conditions laid down would force theatres which had been charging fifteen and twenty

* Testimony of even greater significance than the evidence referred to in the text was first admitted by the District Court over the defendants' objection and later was excluded upon the ground that the branch managers "are merely agents and the scope of their authority could hardly cover these matters" (R. 223). The testimony was that Columbia's branch manager had stated that Columbia opposed the restrictions because its counsel thought them illegal and that it "wouldn't have come in unless the rest did," and that Fox's branch manager stated that Fox violently opposed the restrictions and that, if Columbia and RKO had stuck, "they wouldn't have come in on the restrictions" (R. 220-223). See also an offer of like proof by a third witness (R. 224-225).

cents for ten years or more to advance their prices. It would be a great burden upon them. In fact, it would drive away their customers to a great extent. And on the other horn of the dilemma we showed him the almost impossibility, or at least grave difficulty of running the theatres with the product denied.

*The action taken on the restrictions requested by
Interstate and Texas Consolidated*

Upon receipt of O'Donnell's letters the branch managers, who were themselves without authority to act on the proposed restrictions, notified their home offices (Fig. 15, R. 54). Then followed during the summer a series of conferences between Hoblitzelle and O'Donnell, acting for Interstate and Texas Consolidated, and representatives of the various distributors to discuss the terms of contracts for the 1934-1935 season (Fig. 16, R. 54). In these conferences each distributor was represented, not only by its branch manager, but also by one or more superior officials from outside the State of Texas (Fig. 15, R. 54). The discussions covered both the question of imposition of the restrictions on subsequent-run exhibitors and the actual terms of the contract in such important matters as the amount to be paid the distributor for its pictures, the number of its pictures to be exhibited in Class "A" theatres, and clearance or availability.*

* Clearance or availability means the interval of time which the distributor and the exhibitor agree shall elapse

In the course of these conferences, each distributor defendant agreed to impose both of the requested restrictions upon subsequent-run exhibitors (Fig. 16, *R.* 54), but, as we point out later (*infra*, pp. 36-43), the restrictions to which the distributors uniformly assented varied in important respects from those originally requested.

At this time, it is important to point out that we take issue with the accuracy of appellant's statement (*Br.*, p. 63) that there was "uncontradicted and unimpeached" testimony "that the distributors acted independently of one another and that there was no communication or concerted action among them." As a matter of fact, there is no testimony concerning these conferences which supports that statement. O'Donnell who represented Interstate only went so far as to say that he took the matter up with one distributor at a time. The branch managers who testified, with one exception, used the personal pronoun in stating that they took independent action, the testimony being that "I" acted independently of any other distributor, or that "I" did not know what action other distributors would take, or that "I" did not have prior discussion or conferences with representatives of other distributors (*R.* 153, 198, 201, 213). The ex-

between first exhibition of a picture and its second exhibition in the same city, and the terms likewise apply to like intervals of time between second and third exhibitions, third and fourth, etc. (See Appellants' brief on the prior appeal, p. 2.)

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ception was Columbia's branch manager who testified that "I and my company acted independently of any other company" (R. 217). This witness later admitted that he had no power to agree to the restrictions, that they were "approved by New York", and that "Deals of this magnitude are approved in New York" (R. 218). Indeed, this witness' lack of authority was the ground upon which the defendants themselves objected to, and the court excluded, testimony as to statements which he made concerning the restrictions (R. 223).

Neither Hoblitzelle nor O'Donnell was in a position to testify, nor did either testify, that the distributors, in agreeing to the restrictions, acted independently of one another and without agreement among themselves. The testimony of the branch managers was confined to their personal action.

The only witnesses who could have testified that the distributors acted independently of one another were the superior officials from outside of the State of Texas who represented the distributors at these conferences. None of these officials were called as witnesses.

There is therefore nothing in the record which militates against the District Court's finding that the defendants' failure to produce these officials supported the *prima facie* showing of concerted action resulting from the identity in the terms of the agreements with Interstate.

Some of the distributors reached an agreement more quickly than others. This circumstance is

used by appellants as a basis for inference that there was no concerted action. We set forth below the circumstances causing delay in the four cases where delay occurred,¹⁰ and submit that they do not in any way support this inference.

Although Interstate's requests had covered feature pictures shown in any Interstate first-run theatre charging 40¢ or more for admission and although Interstate operated theatres of this kind in six cities, the eight distributor defendants, with substantial unanimity, agreed to impose and did impose the restrictions in only four of these cities, Dallas, Fort Worth, Houston, and San Antonio

¹⁰ Fox "was handling two outstanding box office attractions" and was "asking considerably increased terms" and the negotiations, begun in July, were concluded in October (R. 178). There is nothing in the testimony to indicate that objections to the restrictions on the part of Fox delayed consummation of the deal.

At the opening of discussion with RKO, Interstate explained its theory, "and while they didn't agree or disagree on the price restriction, or double billing, our great discussion for two months was terms." They "were asking a higher scale of terms for" certain pictures and we "couldn't get together" on the terms for their product. When an agreement was reached in New York on these terms they notified their Dallas agent and the deal was completed upon O'Donnell's return to Dallas (R. 180-181).

Universal's "greatest concern was to try to increase" the number of its pictures to be exhibited in Class "A" theatres and it "took us longer with Universal because of that" (R. 179). Universal's "contention" was that it did not want to agree to the restrictions unless it could get such an increase.

Columbia's concern "was greatly the same as Universal," that is, how many of the distributor's pictures would be exhibited in "A" theatres (R. 181).

(Fig. 16, *R.* 54).¹¹ The omission of Galveston is explained by the fact that there are no competitive theatres in that city (*supra*, p. 7), but the uniform failure to impose the restrictions in Austin, where there are competing subsequent-run theatres, is, as we later contend (*infra*, pp. 41-43), indicative of common agreement and understanding. Similar evidence of identity of action is furnished by the failure of all the distributors to comply with O'Donnell's demand for a price restriction on subsequent-run exhibitors in the Rio Grande Valley (*App. Br.*, p. 24).

¹¹ For all practical purposes, there was complete unanimity in action. For the 1934-1935 season, the season involved in the negotiations, the only departure from uniformity which even appears to be substantial is that Universal's license contracts with subsequent-run exhibitors in Austin included the restrictive provisions requested by Interstate (*A. S.*, par. 12, *R.* 72). There is, however, no evidence that these provisions were actually enforced against exhibitors in Austin, and in the two following seasons Universal's agreement to impose restrictions was confined to the four cities mentioned above (*A. S.*, par. 12, *R.* 72-73).

Paramount's agreement with Interstate for the 1934-1935 season provided for restrictions on subsequent-run theatres in Galveston (*A. S.*, par. 12, *R.* 68). Since there were no competitive theatres in that city, the agreement in this respect was purely nominal.

Metro's agreement with Interstate to impose restrictions did not include Houston (*A. S.*, par. 12, *R.* 66-67), but this omission is wholly without significance because Metro's subsidiary operated a first-run theatre in Houston and Metro did not, prior to the 1936-1937 season, license any pictures for subsequent-run exhibition in Houston (*App. Br.*, p. 24).

The District Court found that while the various distributors did not employ precisely the same language or phraseology in imposing restrictions, "the substance of the restrictions imposed by each distributor defendant was the same" (Fig. 17, *R. 55*). The restrictions imposed for the 1934-1935 season were continued in the two following seasons (Fig. 16, *R. 55*; A. S., par. 12, *R. 65-78*).

The court below found that either of the two proposed restrictions could have been put into effect by any one or more of the distributor defendants without putting the other into effect (Fig. 20, *R. 56*). It also found that, whereas adoption of the restrictions would be financially beneficial to each distributor if they all alike adopted them, adoption of the restrictions by individual distributors, in the absence of substantially unanimous acceptance, would have caused these distributors to lose some of the business of subsequent-run exhibitors and would have resulted in a serious loss in customer good-will (*ib.*).

On the prior appeal in this cause the Government contended and the appellants denied that the District Court had concluded that the distributor defendants, in agreeing to the restrictions, had acted pursuant to agreement and understanding among themselves. The District Court has now fully sustained the Government's position in the prior appeal. It found (Fig. 22, *R. 56*):

From the facts set forth in findings 12 to 21, inclusive, and particularly from the

unanimity of action on the part of the distributor defendants, not *on* [*sic*] one respect only, but in many different respects wherein, apart from agreement, diverse action would inevitably have resulted, I find that the distributor defendants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate and that they agreed and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio.

The effect of the restraints which were imposed

The District Court found that the restrictions caused some subsequent-run exhibitors to increase their admission price to 25¢ and to forego double-billing of restricted pictures and that practically all of the exhibitors making this increase in admission price "would not have done so but for the restrictions imposed by the distributor defendants" (Fig. 25, R. 57-58). It found that the restrictions caused subsequent-run exhibitors who were unable or unwilling to accept the restrictions "to be deprived of the opportunity to exhibit any of the pictures subject to the restrictions, the best and most popular of the new feature pictures" (*ib.*). Another effect of the restrictions in the case of these exhibitors was that "the best entertainment furnished by the motion picture industry" was

withheld altogether from their patrons, "the low-income members of the community" (*ib.*).

The court below also found that the increase in admission prices and the limitation of double-billing resulting from imposition of the restrictions had deflected attendance from subsequent-run theatres to Interstate's first-run theatres, thereby reducing the income of the former, and that there was no evidence that this loss of income had been offset by the higher admission prices which, because of the restrictions, some of the subsequent-run theatres had adopted (Fg. 26, *R. 58*).

The District Court's legal conclusions and decree

The District Court concluded as a matter of law that the distributor defendant, by acting pursuant to a common plan and understanding in imposing the restrictions in question, engaged in a combination and conspiracy with Interstate, Hoblitzelle and O'Donnell, and with each other, in unreasonable restraint of interstate commerce (*R. 58-59*). It also concluded as a matter of law that, apart from any such combination and conspiracy, the respective distributors, in entering into binding agreements with Interstate to impose upon subsequent-run exhibitors restrictions as to minimum admission price or against double-billing, illegally combined to restrain interstate commerce, and that "such undue and unreasonable restraint of interstate commerce is not within any privilege or immunity conferred

upon the distributor defendants by the copyright law" (*R. 59-61*).

The decree which the court entered enjoins the enforcement of the restrictive provisions of the distributors' licensing agreements with subsequent-run exhibitors in Dallas, Fort Worth, Houston and San Antonio (*R. 77-78*). It also enjoins the distributor defendants from including in their future contracts with subsequent-run exhibitors, in any city where the exhibitor defendants operate theatres, restrictions as to admission price or as to double-billing, as the result of any combination among the distributor defendants, "or between the said distributor defendants, and any of them," and the exhibitor defendants, "or any of them" (*R. 78*).

SUMMARY OF ARGUMENT

I. A conspiracy in restraint of trade, which is a partnership in criminal purposes, is seldom capable of direct proof and may be inferred from a common course of conduct or other circumstances. In the present case the circumstances create an almost irresistible presumption that the action of the distributor defendants in all agreeing to impose the same restrictions on competitors of Interstate was the result, not of chance, but of consultation, arrangement and agreement among the distributors to take like action upon Interstate's demands.

The same demands were presented to each distributor. One of the three demands presented was uniformly rejected. The other two were uniformly accepted as to four of the cities included therein. These same two demands were, with substantial unanimity, rejected as to a fifth city similarly situated. This uniform variation between demand and acceptance is striking evidence that the distributors acted in concert in agreeing to impose restrictions upon subsequent-run exhibitors. An additional reason for inferring such concert of action is that if substantially all the distributors agreed to impose the same restrictions, each would benefit, whereas if substantially all did not so agree, the distributors imposing restrictions would lay themselves open to serious injury and damage through loss of business and customer good will. The distributors were, thus under every inducement to agree among themselves to take like action upon the demand for restrictions upon Interstate's competitors. The inference of concert of action arising from the evidence is also strengthened and fortified by the failure of the defendants to call to the witness stand the policy-determining officials of the distributor defendants who alone were in a position to state whether the various distributors had agreed to take common action respecting imposition of the requested restrictions.

II. The declared objective of Interstate when it addressed the same two letters to all the distribu-

tors was to have all or substantially all of them join in imposing certain restrictions upon subsequent-run exhibitors. When each distributor entered into the requested agreement with Interstate, it gave its assent to, joined in carrying out, and became a party to the common and joint undertaking proposed by Interstate. Each distributor linked itself with the others and with Interstate in a common enterprise when, with knowledge that all were invited to unite in a plan to align the distributors in a solid front against subsequent-run exhibitors, it carried out its part of the proposed combination by agreeing to impose restrictions on its own subsequent-run licensees.

III. The admission-price and the double-billing restriction which were imposed upon subsequent-run exhibitors effected an undue and unreasonable restraint of interstate commerce. Whether or not restraints of this kind are necessarily undue and unreasonable, the particular restrictions which were imposed were such because of the harsh, arbitrary, and inequitable manner in which they operated. The restrictions applied to all the subsequent-run theatres alike. They made no allowance for the radical differences in the character of their business operations or for the resulting radical differences in the effect of the restrictions upon these operations. Although the avowed purpose of the restrictions was protection of Interstate's first-run theatres against competition of

subsequent-run exhibitors, the restrictions affected very slightly or not at all the subsequent-run exhibitors who were most competitive and, on the other hand, severely burdened and oppressed those that were least competitive.

If, as the Government contends, the restrictions were imposed by virtue of a conspiracy among all the distributors and Interstate, there was a combination between those having a monopoly of certain pictures required by motion-picture theatres and a company having a substantial monopoly of the motion-picture theatres in the cities where it operates, to deprive competitors of this company of the opportunity to obtain their supplies in a free and untrammelled market. The case clearly falls within the holdings of this Court condemning as illegal under the Sherman Act restraints imposed by a monopolistic combination when the parties refuse to deal with outsiders except upon terms fixed by the conspiring parties.

But even if the distributors and Interstate were not all parties to a joint combination, the restrictions which were imposed effected an undue and unreasonable restraint of interstate commerce. The restraint was coercive since subsequent-run exhibitors were thereby prevented, unless they conformed to the restrictive requirements, from obtaining pictures needed in their business. The restraint was undue and unreasonable in that its purpose was to limit competition and to maintain

prices although the competition which was restrained was not in any respect unfair. Another element of unreasonableness arises from the fact that the restraints were imposed to strengthen the monopoly position of the party proposing the restraints. Finally the restraints must be condemned on the analogy of the cases holding that agreements to maintain resale prices are illegal under the Sherman Act.

IV. The restrictions imposed upon subsequent-run exhibitors are not removed from the prohibitions of the Sherman Act by any privileges conferred by the copyright law even if there was no joint conspiracy between the distributors and Interstate, but merely a series of separate agreements between it and the several distributor defendants. The copyright law confers upon the copyright owner the exclusive right to copy or publish. The courts imply that the right thus conferred permits the copyright owner to license others to exercise these rights and to attach to the license conferred such conditions as are reasonably necessary to enable the copyright owner to secure the reward from his exclusive right contemplated by the copyright law. But the courts, in interpreting the extent of the privilege so conferred, refuse to sanction an extension of the copyright privilege so as to permit, under the guise of their exercise, encroachment upon the general policy of the statutory and common law in favor of freedom of trade, to

which the copyright grant constitutes a limited exception.

Newsreels, travel pictures, and "comics" are almost universally shown in motion-picture theatres together with the feature picture. Accordingly, when one of the distributor defendants as the owner of a copyright on a feature picture fixes the minimum admission price of theatres licensed to exhibit a copyrighted feature picture, it extends its control to matters which lie beyond the confines of its copyright. This provision of its agreement with the licensee is therefore governed by general law and is not exempt therefrom by reason of special immunity derived from copyright law. The situation is analogous to the attempt by a patent owner to extend his limited monopoly over a machine or over a product to unpatented materials and supplies used in or in connection with the patented machine or product.

Irrespective of the foregoing considerations, the restrictions in this case were imposed by virtue of agreements solicited and obtained by Interstate, which owned no copyrights whatever. An unreasonable restraint of interstate commerce imposed by a combination of patent or of copyright owners to make a united exercise of their patent or copyright privileges is not within any immunity given by the patent or copyright law since the restraint flows from the combination rather than from the

individual patent or copyright monopolies. *A fortiori*, a restraint such as that here involved, instigated by a non-copyright owner and resulting from a combination between him and a copyright owner, is outside any immunity given by copyright law. This distinction between imposition of restrictions on licensees by the copyright owner acting for himself alone and imposition of restrictions by agreement between him and a third person is more than technical; it rests upon a substantial difference in the relation of the restrictions to the copyright privilege. The copyright owner, acting individually, will impose restrictions only in so far as he believes that they will promote his own interests as owner of the copyright. But when restrictions are imposed on subsequent licensees because of agreement with the first licensee, the controlling factor in the agreement is likely to be, as in fact it is in this case, the interests of the non-copyright owner. The resulting restraints then really flow from the acts and will of the non-copyright owner and the copyright owner is merely the medium through whom the restraints are made effective.

ARGUMENT

I

THE DISTRIBUTOR DEFENDANTS AGREED AND CONSPIRED AMONG THEMSELVES TO TAKE COMMON ACTION UPON THE DEMAND MADE BY INTERSTATE THAT THEY IMPOSE CERTAIN ADMISSION-PRICE AND DOUBLE-BILLING RESTRICTIONS UPON SUBSEQUENT-RUN EXHIBITORS, AND THE DISTRIBUTOR DEFENDANTS THEREBY CONSPIRED WITH EACH OTHER AND WITH INTERSTATE TO IMPOSE THESE RESTRICTIONS

Appellants do not deny that a combination and conspiracy among the distributor defendants and Interstate is established if the evidence sustains the District Court's finding that the distributor defendants, in agreeing to impose certain admission-price and double-billing restrictions upon subsequent-run exhibitors which Interstate had demanded, entered into these agreements by virtue of and pursuant to an agreement among themselves to act in concert upon Interstate's demand. The initial issue in this case, therefore, is the sufficiency of the evidence to sustain this finding. The issue thus raised calls for some consideration of the character of the evidence by which a conspiracy to restrain interstate commerce may be established.

A. The character of the evidence requisite to establish a conspiracy to restrain interstate commerce

This Court has said that a conspiracy to restrain interstate commerce "is a partnership in criminal

purposes." *United States v. Kissel*, 218 U. S. 601, 608. Since those who conspire to do an unlawful thing do not avow their conspiracy openly or set it out in writing, direct proof of conspiracy is usually lacking. It is well settled, therefore, that a conspiracy may be inferred from the acts and conduct of the parties concerned.

In *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, the evidence showed that the members of certain associations of retailers circulated among themselves a list of the names of wholesalers who sold directly to ultimate consumers. There was no agreement among the retailers to refrain from dealing with listed wholesalers nor was any penalty provided for the failure so to refrain. But since the facts gave rise to a compelling inference that the members of the association had united in a common undertaking to prepare and circulate this "blacklist" for the purpose of causing the members to withhold their patronage from the concerns listed, the evidence was held to show an illegal conspiracy in restraint of interstate commerce. The Court said (p. 612):

But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by con-

certed action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred.

In *American Column and Lumber Co. v. United States*, 257 U. S. 377, the evidence was held to show a conspiracy to promote higher prices and to limit production because the activities of the members of a trade association in carrying out an "open competition plan" necessarily produced these effects and could not adequately be explained except in relation to a purpose to accomplish such ends. This was held even though the facts did not warrant any inference of an agreement upon the specific prices to be charged or upon the extent to which production should be limited.

From the standpoint of the character of the evidence which may be resorted to and of the permissible inferences therefrom, the question is the same where the fact of combination is clear and the controversial issue is the nature of the restraints within the scope of the combination and where, as in the instant case, the nature of the restraints which were imposed is clear and the controversial issue is whether there was combination and conspiracy with respect to such restraints. A combination or a conspiracy to restrain commerce may be "implied from a course of dealing or other cir-

cumstances." *United States v. Schrader's Son, Inc.*, 252 U. S. 85, 99.

B. The parallel action of the distributor defendants upon the demands made upon them by Interstate and by Texas Consolidated not only justifies, but requires, the District Court's finding that they agreed and conspired among themselves to take common action upon these demands

The law is clear that a conspiracy to restrain trade may be inferred from a common course of conduct or other circumstances, and it seems equally clear that, under all the circumstances of the present case, the practical identity in action of the distributor defendants justifies, and indeed requires, the finding of the District Court that they agreed among themselves to take like action upon the demands made in the O'Donnell letters.

In attacking this finding the defendants offer two arguments: (1) that the same demands were presented to each distributor defendant and therefore it may be inferred that the similarity of their acceptance was not due to agreement; (2) that it was to the financial interest of each distributor defendant to accept these demands and for this additional reason independence of action may be inferred.

The difficulty with these arguments is the fact that they tend to support the conspiracy just as much as to rebut it. A conspiracy in restraint of trade is ordinarily accompanied both by identity of agreement and advancement of financial interest.

It is hard to imagine a conspiracy where the conspirators are not united on the same plan of action. It is also hard to imagine why a conspiracy in restraint of trade should be formed if it were not in the financial interests of the conspirators. Of course identity of action coupled with advancement of financial interests do not *necessarily* establish a conspiracy. There is always the possibility that the parties were thinking along the same channels, and that the identity was the product of chance. Nevertheless, these two factors are usually integral parts of every conspiracy, and evidence of them is ordinarily the initial step in the proof of combination in restraint of trade. That proof must go further we admit. However, we are not aware that the existence of these two usual elements in a conspiracy in restraint of trade has ever before been used as arguments against the existence of an alleged conspiracy. It is like using the fact that identical bids were submitted as positive proof that the bidders did not get together in advance of the bidding.

The circumstances which make it well-nigh impossible that this identical action was the product of mere chance will be developed in detail. Briefly summarized, they are these: While the acceptance by the distributors was substantially identical, acceptance did not correspond with the demands originally presented—all of the distributors alike failed to assent to one of the three demands presented to them and in the case of the other two

demands all distributors alike failed to agree to these demands as to one of the cities included in the demands. Such a uniform variation can hardly be the product of chance. If it is not conclusive proof in itself, because of the laws of probability, at the very least it puts the appellants under the burden of furnishing an adequate explanation of the uniform variation between demand and acceptance.

- (1) *The uniform failure to impose the requested restriction on subsequent-run exhibitors in the Rio Grande Valley*

The O'Donnell letter of July 11, 1934, made two demands for an admission-price restriction of 25¢ on subsequent-run exhibitors. One demand covered feature pictures which had been exhibited in any Interstate theatre charging an admission price of 40¢ or more and the other covered any feature picture which had been shown in a Texas Consolidated first-run theatre in the Rio Grande Valley charging an admission price of 35¢ or more.

The principal explanation offered by appellants for the uniform acceptance of the Interstate demand and the uniform rejection of the Texas Consolidated demand is that the two demands were materially different. Appellants contend (Br., pp. 50-52) that the Interstate request was that any feature shown in one of its first-run theatres charging 40¢ or more for admission should not thereafter be exhibited in the same city for less than 25¢ admission, whereas the Texas Consolidated re-

quest was that any feature picture shown in one of its first-run theatres in the Rio Grande Valley charging 35¢ or more for admission should not thereafter be exhibited *in any city located in the Valley* for less than 25¢ admission. We submit that this interpretation of the Texas Consolidated request, which is in direct conflict with the finding of the District Court (Fig. 12, R. 53), is clearly erroneous.

Appellants base their interpretation on the italicized words in the following sentence in O'Donnell's July letter: "We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs *in the Valley* at 25¢." It is true that the italicized words, on their face, have an application as broad as that which appellants ascribe to them, but it is also true that the language used in stating the request by Interstate, both in the letter of April 25, 1934, and in the letter of July 11, 1934, has, on its face, an equally broad application. In the April letter O'Donnell wrote that, as to pictures shown in an Interstate first-run theatre charging 40¢ or more for admission, "we are going to insist that *subsequent run prices* be held to a minimum scale of 25¢" (A. S., par 10, R. 63). In the same letter he wrote that these pictures "must not be exhibited *in the subsequent runs* at less than 25¢ at any future time" (*ib.*). In his July letter he wrote that Interstate would not purchase pictures

for exhibition in its first-run theatres charging 40¢ or more for admission unless distributors agree that these pictures "will never be exhibited at any time or *in any theatre*" at an admission price of less than 25¢ (A. S., par. 11, R. 64). There is nothing further in either of these letters tending to restrict the scope of the quoted words.

The O'Donnell letters are phrased in the language of one business man addressing another rather than with the meticulous care for precise expression appropriate to a legal document. Having regard for the fact that the purpose of O'Donnell's requests was to protect first-run houses against competition from subsequent-run houses, the requested restrictions were naturally understood as applicable only to the area of competition, that is, to subsequent exhibition in the same city in which there had been a first-run exhibition in an Interstate or Texas Consolidated theatre. In any event, the conclusive answer to appellants' contention is that, since the language of the Interstate and of the Texas Consolidated request was equally general, the requests cannot be differentiated by giving one of them a broad application and the other a limited application.

Appellants' second argument to show that the uniform elimination of Valley cities from the restrictions was pure accident and not concerted action is worthy of some analysis. The appellant rightly feel this uniform refusal to accede to a de

mand is an odd coincidence requiring explanation. Their explanation is that "There are no facts stipulated or any evidence to show that it was to the financial interest of any distributor to grant the request of Texas Consolidated." (Br., p. 52.) Therefore, they infer there was no reason proved for implying a conspiracy or uniformity of action. The Court will recall that earlier in the brief appellants insisted that an inference of conspiracy was rebutted by proof that the distributors acted to advance financial interests. Now they claim the same inference is rebutted because that proof is *lacking*. We consider the coincidence of this uniform refusal to accede to the demand of Texas Consolidated significant evidence of conspiracy. It is true as appellants assert that "the Government asked no question of any witness concerning the situation in the Valley." The witnesses were hostile. The Government had developed one of those circumstances which was difficult to explain on any theory of pure chance. The burden was on the defendants to explain it.

The District Court found that there was no evidence that the exhibitor defendants withdrew the demand for a price restriction in the Rio Grande Valley prior to or during the negotiations with the distributors (Fg. 18, R. 55). Appellants point out (Br., p. 53) that there was likewise no evidence that they continued to press this demand during these negotiations. The demand having been made

and negotiations having immediately ensued,¹² the presumption, in the absence of any evidence of withdrawal, is that the demand was not withdrawn. The Government is entitled to rely upon the inference of combination arising from the parallel action of the distributors without negating the existence of all possible facts or circumstances which, had they existed, might have destroyed this inference.

(2) *The uniform failure to impose the requested restrictions in Austin*

Interstate requested that the distributor defendants agree to impose restrictions as to admission price and as to double-billing on subsequent-run exhibitors in the cities in which it operated, but in one of the six cities, Galveston, there were no competing theatres. Pursuant to this request, all of the distributors imposed both restrictions on subsequent-run exhibitors in four of the other five cities, but (with the possible exception of Universal for one season only) (*supra*, pp. 18-19), none of them imposed, pursuant to the same request, either of the restrictions in Austin. Here, then, is a second striking example of unanimity of action.

Appellant's principal contention in this connection (Br., pp. 54-57) is to deny that the District Court was correct in finding (Fig. 16, R. 54) that

¹² In the case of at least two distributors, agreement upon restrictions was reached within less than a month from the letter of July 11, 1934 (A. S., par. 12, R. 66, 76).

there was substantial unanimity of action respecting Austin. The Government submits, however, that the instances of alleged diverse action which appellants cite do not show diversity in their agreements with Interstate.

Appellants point to the fact that the forms of license agreements which Metro, RKO, and Vitagraph employed generally throughout the United States during the 1934-1935 season contained restrictions against double-billing. It may be assumed that these license provisions were incorporated in contracts made with their subsequent-run licenses in Austin, but this is no indication whatever that these distributors agreed with Interstate to impose the double-billing restriction in Austin. Moreover, in the case of the price restriction, which was imposed solely by virtue of agreement with Interstate, each of these distributors confined the restriction to the cities of Dallas, Fort Worth, Houston, and San Antonio (A. S., par. 12, R. 66-67, 75, 77).¹³

¹³ For reasons already stated (*supra*, p. 20), Metro did not agree to impose any restrictions in Houston.

Appellants suggest (Br., pp. 56-57) that when the Agreed Statement of Facts states that a restriction was imposed in certain named cities, this is not the equivalent of a statement that the restriction was not imposed in the Interstate cities not named therein. Such an interpretation of the effect of the Agreed Statement does violence to its purpose and nature, which was to set forth a *complete* résumé of *all* action taken by the distributors with reference to the restrictions requested in the O'Donnell letters.

Appellants also point to the fact that United Artists had long had a policy against double-billing, as well as a "general policy" (*supra*, p. 12) against subsequent exhibition of its pictures at less than a 25¢ admission. The situation as to it is like that discussed above. In so far as this policy of United Artists may have led to restrictive provisions in its contracts with subsequent-run exhibitors in Austin, no possible inference can be drawn that this was done by reason of agreement with Interstate. The stipulated facts relative to the action of United Artists (*ib.*, R. 73-74) clearly indicate that its agreement with Interstate did not include Austin.

The only other alleged instance of diversity, apart from Universal, is that Interstate, in its contract with Fox for the 1934-1935 season, agreed to observe both restrictions in its own subsequent-run theatres and did not limit its agreement to Dallas, Houston, Fort Worth, and San Antonio. This is without significance. Interstate was thereby merely carrying out the commitment which it made when it requested the restrictions, that it would observe the restrictions in its own theatres. Furthermore, its subsequent-run theatres in Austin were charging 25¢ for admission (A. S., par. 7, R. 58), so that observance of this minimum in Austin did not in fact constitute any restriction upon its theatre operations in that city.

Appellants seem to urge (Br., pp. 57-58) that the situation in Austin should be wholly excluded

from consideration because the Government's testimony and certain statistics included in the Agreed Statement of Facts were limited to Dallas, Fort Worth, Houston and San Antonio. Proof relating to the effect of the restrictions upon subsequent-run exhibitors was naturally limited to the cities where the restrictions were actually imposed, but this limitation in the scope of certain evidence furnishes no reason for disregarding the inference of agreement and combination arising from uniform failure to extend the restrictions to Austin.

Appellants state (Br., pp. 57-58) that it is not definitely shown that the competitive subsequent-run theatres in Austin charged less than 25¢ for admission or that they double billed. But there was evidence that independently operated subsequent-run theatres in Texas customarily charged 15¢ or 20¢ for admission and generally double billed, and 17 of the 18 theatres of this kind whose operations were described were shown to have charged less than 25¢ for admission (*supra*, p. 11). One other point mentioned by appellants, the fact that Austin is smaller in size than the four cities where restrictions were imposed, might have led *some* of the distributors to refuse the restrictions in the smaller city, while accepting them in the larger cities; but it is not reasonable to suppose that *all* would have pursued this course if they had been acting wholly independently, without prior consultation, arrangement, or agreement.

- (3) *The inference of agreement arising from the distributors' unanimity of action in all agreeing to impose both restrictions in the principal Interstate cities*

The foregoing discussion has dealt with the involved and insubstantial circumstances on which appellants rely to rebut the inference arising from their uniformity of action in the cities and area where the restrictions were not affirmatively imposed. Our principal reliance, however, is obviously upon the identity of action by the distributors where positive action was taken.

To explain the positive uniformity of action in imposing restrictions in Dallas, Fort Worth, Houston, and San Antonio, the principal reason given by appellants is that the action was financially beneficial to each distributor. We have already pointed out that this explanation works both ways since financial interest is an ordinary part of every conspiracy. We will now go further and show that the financial interests of the defendant would be advanced only if concerted action were taken by at least the greater part of them.

The question confronting each distributor assuming that it acted in the matter truly independently of any other distributor, would be the effect upon it if it accepted the restrictions and any representative number of the other distributors did not. The question which it had to decide was whether the increased license fees which, by reason of its acceptance of the restrictions, it could expect to receive from Interstate, the first-run

exhibitor, would or might be more than offset by tangible or intangible losses in other directions. If so, and if such losses would not be suffered if substantially all the distributors accepted the restrictions, the various distributors were under every inducement to agree among themselves upon a common course of action, prior to agreeing with Interstate to impose the requested restrictions. The Government proposes to show that the conditions just stated are those under which the distributors gave their assent.

Restrictions of the kind proposed were unprecedented (*supra*, pp. 11-13) and were strongly opposed by the independent exhibitors, who were organized (*supra*, pp. 15-16). If certain distributors had agreed to impose the restrictions and others had not, the subsequent-run exhibitors in Interstate cities would have obtained their feature pictures from the distributors who did not impose the restrictions and the distributors who did impose restrictions would have lost this business, a loss far from negligible.¹⁴ But this does not measure the full extent of the probable loss of these distributors. An organized campaign by the independent exhibitors of Texas to withhold business

¹⁴ In the 1934-1935 season the revenue received by the distributor defendants from exhibitors other than Interstate located in Interstate cities was \$369,594.72, or 39% of the revenue of \$944,452.85 which they received from first-run exhibitions in Interstate theatres (A. S., pars. 5-6, R. 52-53).

from the distributors imposing restrictions, a movement which would serve as a warning to the distributors not to extend the objectionable practice of admission-price and double-billing restrictions, was likely. If this had occurred, the business lost would not have been confined to that of the subsequent-run exhibitors in Interstate cities. Certainly the damage resulting from loss of the customer good-will of the independent exhibitors was potentially serious.¹⁵

All danger of losses of this kind would be removed, however, if *all* the distributors agreed to the restrictions. The subsequent-run exhibitors directly affected would then have no alternative source of supply for pictures of the quality demanded by their patrons and neither these exhibitors nor other independent exhibitors could translate their opposition to the restrictions into actual withholding of business since, with all the distributor defendants taking the same action, a shift of business from one to another would be meaningless and ineffective.

There is a further consideration which powerfully supports the view that the distributors recognized, and had acted upon the belief, that imposition of the restrictions by individual distributors,

¹⁵ Population figures furnish a very rough base for estimating the possible stakes involved. On the basis of 1930 census figures, the population of the four Interstate cities where restrictions were imposed was, in round figures, 945,000 (see App. Br., p. 57) and the population of Texas 5,824,000, or a ratio of about 1 to 6.

in the absence of substantially unanimous action, was a dangerous and undesirable step to take. It is stipulated that the practices which the restrictions prohibited reduce the total license fees received by the distributor (A. S., pars. 18-19, R. 79). Appellants cannot deny that the distributors were aware of the facts so stipulated—appellants' argument that the distributors' unanimous action on the restrictions is not indicative of agreement is based upon the premise that each distributor was aware that imposition of the restrictions would be to its own self-interest. Under these circumstances, how account for the fact that, with the exception of United Artists (whose business differed materially from that of the other distributors), not one of them had previously undertaken to advance its own interests by imposing the 25¢ admission-price restriction on subsequent-run exhibitors?¹⁶ Obviously any distributor could take this step without prior demand by Interstate and without making the restriction a matter of agreement with Interstate.

To a lesser extent, the same question demands answer in connection with the general failure of the distributors, prior to their unanimous action, to prohibit double-billing of the pictures covered by Interstate's demand. Other than United Artists,

¹⁶ There is testimony which is open to the interpretation, although the meaning is not entirely clear, that Vitagraph had previously imposed a 20¢ admission-price restriction on subsequent exhibition of its Class "A" pictures (R. 201-202).

only one distributor (and it only for one prior season) had previously undertaken to prohibit double billing (*supra*, p. 13).

Appellants may urge that the experience of United Artists demonstrates that the restrictions could be successfully imposed by an individual distributor. We submit that no general conclusions can be drawn from the experience of this distributor. Its business differed from that of any of the other distributors, in that it specializes in the production of a few pictures of very high quality and it makes "individual contracts per picture" whereas the other distributor defendants enter into contracts which cover the pictures for an entire exhibition year (R. 180). How different its business is from that of the other distributor defendants is shown by the figures on releases. In the 1934-1935 season it released eight feature pictures and the smallest number released by any other distributor defendant was 39 and the average for the other seven distributors was 47 (A. S., par. 3, R. 50-51).¹⁷ For the next season United Artists released 15 pictures and the smallest number released by any other distributor defendant was 28 and the average of the other seven distributors was 50 (*ib.*).¹⁷

¹⁷ In these computations the releases of "20th Century" are included with those of Fox, 20th Century later becoming a part of the Fox organization (A. S., par. 10, R. 62). Prior to this amalgamation, 20th Century was evidently not a major distributor and it was not included among the distributors to whom the O'Donnell letters were sent.

The assumption upon which appellants discuss the question of relative advantage or disadvantage to an individual distributor from acceptance or non-acceptance of the restrictions, namely, that the distributor was confronted with a choice between losing the first-run business of Interstate and possible loss of some of the business of subsequent-run exhibitors is, we submit, a highly doubtful and probably false assumption. It is true that this was the proposition which Interstate laid before the distributors, but it is pure assumption that Interstate would ever have carried out its threatened course of conduct if any representative number of the distributors had failed to agree to the restrictions. The variation between the original demands and the distributors' final acceptance is conclusive evidence that the demands were open to modification. Appellants in their reply brief on the former appeal (p. 10) stated that the demands were "invitations to negotiate upon general principles laid down by Interstate."

The first-run business of Interstate was of great importance to the distributors, but opportunity to exhibit in its first-run theatres the best of the distributors' feature pictures was of even greater and more vital importance to Interstate.¹⁸ The situa-

¹⁸ The distributors distributed films throughout the United States. Interstate exhibited pictures in six cities. The distributors could much more easily afford to lose Interstate as a first-run outlet than Interstate could afford to risk a loss in patronage in its large and expensive theatres by cutting itself off from any important source of supply of pictures with good drawing power.

tion was therefore one where mutual self-interest would have dictated a compromise agreement of some sort if some of the distributors had refused to agree to impose the restrictions.

- (4) *The significance of the failure to call as witnesses the superior officials of the distributors who participated in the negotiations with Interstate*

Acceptance or rejection of the demands made by Interstate lay wholly within the hands of the home officials of the distributor defendants. Upon receipt of the O'Donnell letters, the branch managers, who "themselves had no authority to agree to the proposed restrictions," immediately referred the letters to their New York offices (Fig. 15, R. 54). The branch managers were in no position to know, nor did they assume to testify that they knew, what transpired in the way of consultation, agreement, or understanding among superior officials of the various companies with reference to acceptance or non-acceptance of Interstate's demands. One of the branch managers frankly stated (R. 199):

Of course, I would not know what conversations might have taken place in New York or Los Angeles concerning these restrictions between representatives of our company and representatives of other companies.

The branch managers' complete lack of participation in the formulation of policy respecting the restrictions is indicated by the fact that there was

no correspondence whatever relating to the restrictions in the files of four of the branch managers, while in three other cases the correspondence did not go beyond the point of forwarding O'Donnell's July letter to the company's home office (R. 152-156, 158-159).¹⁹ The branch managers took part in the conferences on the terms of 1934-1935 contracts, in the course of which conferences each distributor agreed to impose the restrictions, but each distributor was also represented in these conferences by one or more superior officials from outside the State of Texas (*supra*, p. 16). Not one of these policy-determining officials, qualified to state whether the action which his company took was or was not the product of prior consultation, agreement or understanding with other distributors, was called to the witness stand.

This Court has said that when an officer of a defendant company having peculiar knowledge of facts material to the issues fails to testify, "His silence makes strongly against the company." *Mammoth Oil Co. v. United States*, 275 U. S. 13, 52. (See also *Local 167 v. United States*, 291 U. S. 293, 298; *Bilokumsky v. Tod*, 263 U. S. 149, 153-154.) The Government does not contend that failure to testify can supply proof of any fact not reasonably supported by the substantive evidence in the case. Its contention is that the inference

¹⁹ A letter written by the eighth branch manager was found (R. 160), but was not introduced in evidence by either party.

of concerted and common action springing from the substantive evidence in this case is supported and fortified by the defendants' failure to summon as witnesses those officials who alone were in a position to refute this inference provided it were false.

Appellants attempt to explain the failure to call these superior officials as witnesses by stating (Br., p. 61) that at the close of the Government's testimony the question of conspiracy among the distributors "did not appear to be" an issue in the case. We submit that the testimony which they offered through certain branch managers that these managers had personally acted without consultation or agreement with other distributors (*supra*, pp. 17-18) is inconsistent with the position now taken. Appellants' further contention (Br., pp. 61-62), that the testimony of O'Donnell and the branch managers fully covered the ground and that the testimony of the distributors' superior officials would therefore have been merely cumulative, must be rejected because the testimony referred to fell far short of covering the ground (*supra*, p. 18).

C. Cases presenting the question of inferring agreement or combination from the unanimous action of distributors of motion-picture films

Appellants rely upon *Shubert Theatre Players Co. v. Metro-Goldwyn-Mayer Distributing Corp.* and *Rolsky v. Fox Midwest Theatres, Inc.*, two unreported decisions by federal District Courts, and

Glass v. Hoblitzelle, 83 S. W. (2d) 796,²⁰ a decision by the Texas Court of Civil Appeals. Where the issue is whether the evidence shows conspiracy, decisions in other cases have very little weight. This is true, even though part of the evidence relating to conspiracy in the other cases consisted of acts or conduct similar to some of the acts or conduct relied upon as evidencing conspiracy in the case under consideration.

In contrast with the conclusions reached in the cases cited by appellants, we call attention to *Vita-graph, Inc. v. Perelman*, 95 F. (2d) 142 (C. C. A., 3rd), certiorari denied October 10, 1938, affirming *Perelman v. Warner Bros. Pictures*, 9 F. Supp. 729 (D. C., E. D. Pa.). This was a suit under the Sherman Act by an exhibitor in Philadelphia to enjoin a conspiracy among various distributors to prohibit double-billing by exhibitors in that city. There was evidence that the defendants had for some years been "trying in every possible way to restrict" double-billing and that at a meeting of exhibitors, producers, and distributors in May 1934 a representative of the latter, speaking on their

²⁰ This was an appeal from an interlocutory order denying a temporary injunction in a suit under the antitrust laws of Texas. The trial court rested its decision upon five distinct grounds, one being the insufficiency of the evidence to show conspiracy. While the appellate court stated that it approved all of the conclusions of the trial court, it discussed three of these at length but it did not even refer to the lack of proof of conspiracy.

behalf, stated that a method had been devised to stop this practice and that the distributors could take and had taken steps to stop it. The defendants' branch managers in Philadelphia testified that there was no conspiracy or concerted action between the defendants with reference to prohibiting double-billing and that their contract provisions forbidding the practice were the result of independent judgment. Both the District Court and the Circuit Court of Appeals, in holding that the evidence established an illegal conspiracy to restrain interstate commerce, regarded the distributors' unanimity in prohibiting double-billing as persuasive evidence of conspiracy. See 95 F. (2d) 142, 146; 9 F. Supp. 729, 731.

II

THE DISTRIBUTOR DEFENDANTS CONSPIRED WITH EACH OTHER AND WITH INTERSTATE TO IMPOSE THE RESTRICTION IN QUESTION EVEN IF, AS APPELLANTS CONTEND, THE AGREEMENTS BETWEEN THE VARIOUS DISTRIBUTORS AND INTERSTATE WERE ENTERED INTO WITHOUT PRIOR AGREEMENT OR UNDERSTANDING AMONG THE DISTRIBUTORS TO TAKE UNIFORM ACTION ON INTERSTATE'S PROPOSALS

We have previously discussed the question of conspiracy among the distributors upon the basis that the evidence establishes that the distributor defendants agreed among themselves upon a common course of action with reference to imposition of the restrictions. We now contend that, even if the evidence fails to show an agreement of this kind

among the distributors, their common agreement with Interstate to impose restrictions made them parties to such a conspiracy.

The objective which Interstate announced when it addressed the same two letters to all the distributors was to subject subsequent-run exhibitors to certain restrictions with respect to every feature picture which had been shown in an Interstate first-run theatre at an admission price of 40¢ or more. Since feature pictures of all the distributors were shown in these Interstate theatres, Interstate's objective could not be carried out unless all or substantially all of the distributors joined in carrying out its proposal to procure imposition of these restrictions. Each distributor was aware that what Interstate was proposing was not a special arrangement between it and Interstate, but was an integral part of a plan by Interstate to unite all the distributors in the imposition of certain restrictions upon subsequent-run exhibitors. If the evidence does not definitely establish that the distributors knew that the letter of April 25, 1934, was sent to all of them, it does definitely establish that they knew this to be true of the final and superseding letter of July 11, 1934, which showed on its face that it was addressed to the local representative of each distributor.

When each distributor entered into the requested agreement with Interstate, it gave its assent to, joined in carrying out, and became a party to the

common and joint undertaking proposed and initiated by Interstate. It is immaterial that the several distributors, in thus participating in and furthering this joint undertaking, may have taken this step without prior understanding or agreement with other distributors as to concert of action. It is also immaterial that the medium for carrying out the conspiracy was a series of agreements between Interstate and each distributor or that the agreements of the several distributors with Interstate may not have been conditional upon the making of like agreements by other distributors. Each distributor linked itself with the others and with Interstate when, with knowledge that all were invited to unite in a plan to align the distributors in a solid front against subsequent-run exhibitors, it furthered the declared objectives of this undertaking by agreeing with Interstate to carry out the particular part in the combination allotted to it—imposing the restrictions in question on its own subsequent-run licensees.

If it be the fact, as we are now assuming, that some of the distributors agreed with Interstate to impose the restrictions without then knowing whether or not all the other distributors would make like agreements, this fact does not make the conspiracy any less a joint one among the distributors and Interstate. The agreements so made were made in response to a proposal for common action by the various distributors and in contem-

plation of such common action. For a conspiracy to be formed, it is not necessary that all the conspirators should become parties simultaneously. Neither is it necessary to consider what the situation would be if, after some of the distributors had agreed to the restrictions, the conspiracy had failed or had materially altered in character because of the failure of other distributors so to agree. In the case before the Court the conspiracy, as originally proposed, was carried out and became effective.

The effect of holding otherwise would be to create a loophole in enforcement of the antitrust laws which is available in no other sort of criminal conspiracy. Suppose that a group of laborers were mutually and financially interested in an act of trespass. Suppose that the ringleader wrote a letter to each of them pointing out the nature of the general plan, offering financial inducements and asking that each agree to assist him in the enterprise. It could scarcely be contended that in order to make this conspiracy complete there would have to be any further agreement between those who were hired or who contracted to assist the ringleader. In the case at bar, the nature of the general plan was clear to all who were asked to assist. Its purpose was clear—to impose burdens upon competitors. Each of the distributors knew that the others were being approached simultaneously to carry out the plan. Those who join the enterprise under such circumstances have joined in an agreement in re-

straint of trade. Nothing more need be added to complete the conspiracy.

III

THE ADMISSION-PRICE AND THE DOUBLE-BILLING RESTRICTION IMPOSED UPON SUBSEQUENT-RUN EXHIBITORS EFFECTED AN UNDUE AND UNREASONABLE RESTRAINT OF INTERSTATE COMMERCE

A. The restrictions imposed restraints of a harsh, arbitrary, and inequitable character

There are wide differences in subsequent-run theatres, both in the theatres themselves and in the manner of their operation. Appellants nevertheless enforced the same restrictions against all subsequent-run theatres and the result of this failure to make any allowance for the varying character and operations of subsequent-run theatres was that the restrictions severely burdened and oppressed some types of subsequent-run theatres and either did not affect at all or affected very slightly other types.

One major difference between subsequent-run theatres is the difference in the time in which they become entitled to exhibit feature pictures. Just as the contract between the distributor and the first-run exhibitor provides for clearance—a minimum lapse of time between first exhibition and second exhibition—so there is clearance provided for in the contracts with subsequent-run exhibitors, that is, an agreed minimum lapse of time between second and third exhibition, third and fourth, fifth

and sixth, etc. In the Interstate cities the usual brackets of time, computed from first exhibition, were 45, 60, 75, and 90 days (R. 190). While, in general, all the distributors had about the same clearance (R. 196), the clearance on United Artists' pictures was 75 days for Interstate subsequent-run theatres and 90 days for other subsequent-run theatres (R. 214). One independent exhibitor testified that his pictures were shown about 120 days behind the first exhibition (R. 112).

The second-run exhibitor, of course, pays higher license fees on account of his earlier exhibition time as compared with second-, third-, or fourth-run exhibitors and, in turn, he receives, and offers to his patrons what is in effect a superior product. The subsequent-run theatres able to pay these higher license fees are those that are relatively large and modern and located in reasonably prosperous neighborhoods and the higher license fees which they pay are offset by the higher admission prices which they charge. The poorer class of subsequent-run theatres offering a staler product and having less commodious accommodations and less modern equipment, cannot successfully compete except by charging a lower admission price and, frequently, by offering an additional inducement in the form of two feature pictures for one price of admission. Accordingly, the better class of subsequent-run theatres, the "upper crust" of the group, usually exhibiting second-run, charging 25¢ or per-

haps more for admission, and not double-billing, not affected by restrictions which require a 25¢ admission charge and limit double-billing while the poorer class of subsequent-runs, offering third-, fourth-, or fifth-run exhibitions, either cannot meet the requirements at all and are thus denied the best product of the industry, no matter how stale, or are forced to charge the same admission price and to operate upon the same basis as rival theatres offering a fresher product under more attractive conditions.

The restraints imposed here are just as unreasonable as would be the restraint if a combination were formed to compel dealers in secondhand automobiles to sell all cars of the same make and body-type at the same price, irrespective of the age of the car, its mileage, or general condition.

The harsh and arbitrary character of the restraints imposed in this case, originating with Interstate and enforced by agreement between it and a group of distributors having substantial monopoly power, is emphasized by the fact that practically all of Interstate's subsequent-run theatres were of superior type (R. 190) and by the further fact that *Interstate theatres played an average of 15 days ahead of other subsequent-run theatres* (R. 196).²² It is therefore not surprising that In-

²² O'Donnell, who gave his testimony, said at another point that feature pictures were shown in Interstate subsequent-run houses either before they were shown in other subsequent-run houses or, sometimes, simultaneously (R. 190).

terstate was willing to observe the requested restrictions in its own subsequent-run theatres, but it would be illusory to view this willingness as indicating that the restraints were either reasonable or fair.

But apart from this particular aspect of unreasonableness, subjecting those differently situated to the same requirements, the undue and unreasonable character of the restraints imposed is manifest. The Government is quite willing that the Court should, as appellants request (Br., pp. 67-68), apply to this case the doctrines of *Chicago Board of Trade v. United States*, 246 U. S. 231, and *Appalachian Coals, Inc., v. United States*, 288 U. S. 344. The contrast between the facts upon which decision rested in the latter case and the facts of the instant case is striking and, when noticed, serves to buttress our view of the present restraints. In that case the Court held that where an industry had long been burdened with capacity in excess of demand and with declining production and prices, a combination among a large number of producers which would eliminate price competition among this group, but without giving them power to fix the market price of the product, and which would at the same time mitigate certain marketing prac-

One independent operator of a chain of theatres had subsequent-run theatres in a particular section of Dallas which showed ahead of Interstate's theatres in that section (R. 208-209). This independent naturally did not oppose the restrictions and testified for the defendants.

tices which gave buyers an unfair advantage over sellers, does not unreasonably restrain trade. To compare the situation here, it is to be borne in mind that the business of the exhibitor is analogous to that of the retailer. We find, then, that Interstate, with a monopoly of the business of retailing the most valuable product dealt in by these retailers, first-run exhibitions, has combined with those who substantially control the supply of goods required by the retailers, for the purpose of withholding certain supplies from Interstate's competitors unless they accept its dictation of their resale price and other restrictions upon the conduct of their business.

Appellants seem to think that they can establish the reasonableness of the restraints by showing that the competition of subsequent-run theatres was making it difficult for Interstate to operate its first-run theatres profitably at their existing scale of admission prices. This situation represents the every-day workings of competition and there was nothing even verging on the unfair in the competition which the restrictions were intended to and did curb. As Hoblitzelle testified (R. 161-162), Interstate might have met the competition by lowering admission prices in its first-run theatres. This decrease in admission prices would have lowered its license fee payments, which are generally based upon a percentage of the gross receipts (App. Br., p. 9). The other course, and the one followed, was

to maintain its own prices and to compel, by combination with others, competitors to increase theirs; in other words, the familiar form of illegal restraint represented by price-fixing or price-maintenance. Interstate's president viewed the restraints in this light. He testified that he felt that the "constructive thing to do was to try to maintain a fair price structure for the better pictures" (R. 161).

Appellants present the question of reasonableness chiefly from the standpoint of the benefits Interstate would derive from the restrictions. In view of Interstate's monopoly position, which the restrictions strengthened, this is a doubtful ground of justification. But in any event the question whether the restrictions unduly or unreasonably restrained commerce must be determined primarily upon the basis of the effect of the restrictions upon those who were subjected thereto, the subsequent-run exhibitors. We have previously quoted testimony of one such exhibitor as to this effect (*supra*, pp. 15-16). Another testified (R. 148):

In my estimation it was absolutely necessary for me to use the [restricted] pictures. The showing of these pictures very definitely necessitated a change in my admission price at the Knox Street and Fair Theatres. * * * The effect upon my revenue at the Knox Street Theatre in increasing the price, I would say was to hurt my business around twenty-five per cent on gross receipts. At the Fair Theatre it affected me even more because of the location of the theatre. It is

in a poor part of Dallas and for that reason I was charging 15¢ to start so it hurt me even more to have to raise it to 25¢.

Appellants do not question the accuracy of the District Court's finding that the restrictions deflected to Interstate's first-run theatres attendance which would otherwise go to subsequent-run theatres (Fg. 26, *R.* 58) but appellants suggest (*Br.*, p. 25) that higher admission prices brought about by the restrictions might offset the income lost through decreased attendance. This is a speculative offset against an assured loss.²² Furthermore, the subsequent-run exhibitor must be assumed to be the best judge of what is in his own interest. The District Court found (Fg. 25, *R.* 57), with ample evidence to support it (*R.* 124, 138, 141, 143, 148), that practically all of the exhibitors who were forced by the restrictions to increase their admission price "would not have done so but for the restrictions." As to the exhibitors who found it impracticable to increase admission prices or to forego double billing, the effect of the restrictions was even more burdensome. These distributors were deprived by appellants' combination of the opportunity to show in their theatres the best

²² Since it is, in effect, stipulated that the restrictions increase the income of Interstate's first-run theatres (*A. S.* pars. 18-19, *R.* 79) and since this increase in income could come about only by obtaining attendance which would otherwise go to subsequent-run theatres, the loss in question must be regarded as certain.

and most popular product of the industry. And while these exhibitors undoubtedly competed with some of Interstate's subsequent-run theatres, it is questionable whether they competed at all with its first-run theatres, in the interests of which the restrictions were nominally imposed.

B. The restrictions unduly and unreasonably restrained interstate commerce if, as the Government contends, they were imposed pursuant to a joint conspiracy among the distributor defendants and Interstate

If, as the Government has contended (*supra*, pp. 34-52) the restrictions were imposed by virtue of a conspiracy among all the distributors and Interstate, the unreasonableness of the restraint of trade is so patent as to require little argument or citation of authorities. By such a combination the distributors, having a substantial monopoly of pictures which subsequent-run exhibitors require in their business, agree to refuse to make contracts with subsequent-run exhibitors for the exhibition of certain feature pictures (representing the most prized product of the industry) unless the latter agree to comply with certain drastic restrictions on the conduct of their own business. By the combination the distributors not only limit their own freedom to trade, but deprive subsequent-run exhibitors of the freedom to deal and bargain with each distributor individually upon the question whether either, both or neither of the restrictions

in question, or some modification thereof, shall be included in their licensing contracts. Combinations to refuse to deal except upon the acceptance of terms which the parties to the combination have agreed to impose have been universally condemned as illegal under the Sherman Act. *Montague Co. v. Lowry*, 193 U. S. 38; *Eastern States Lumber Association v. United States*, 234 U. S. 600, *supra*; *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30; *First National Pictures, Inc. v. United States*, 282 U. S. 44.

The last two cases cited are particularly pertinent because they involve practically the same group of distributors (or their predecessors) as the distributor defendants here and because the restraints in those cases were far more innocuous than those with which we are now concerned.

In the *Paramount* case the distributors agreed that they would contract with exhibitors only in accordance with the terms of a certain standard exhibition contract. This contract left the parties free to make their own agreement upon price and upon the kind and number of pictures to be licensed, and, for the most part, it merely had the effect of standardizing contract provisions. The only provision to which the exhibitors took serious exception was one for the compulsory arbitration of any controversy growing out of the contract. While the arbitration procedure set forth in the standard contract might be regarded as giving the distrib-

tors some slight advantage over exhibitors, it was not grossly discriminatory against the latter. Compared with dictation of the exhibitor's minimum admission price, the restraint was negligible. The power to determine sales price—the exhibitor's admission price is the equivalent of the ordinary trader's sales price—is of the very essence of freedom to trade and to compete. The power to determine what shall be offered for sale—in this case, the power to determine whether or not to offer patrons more than one feature picture—is a matter of almost equally grave concern.

In the *Paramount* case, as in the present case, the agreement did not bar *all* competition. Other than the matters as to which there was agreement to take uniform action—in the one case, use of the standard contract and, in the other case, imposition of the admission-price and double-billing restrictions—the distributors were left free to compete with each other for the business of exhibitors and the exhibitor was left free to bargain with distributors for the best possible terms. But, as this Court said in the *Paramount* case (p. 44), "In order to establish violation of the Sherman Act it is not necessary to show that the challenged arrangements suppresses all competition between the parties."

In the *First National Pictures* case the distributors, through the medium of local film boards of exchange, set up credit committees to obtain full information concerning all sales or transfers of

theatres and to determine, after investigation, whether the sale or transfer was made by the previous owner for the purpose of avoiding or being relieved of uncompleted contracts for exhibiting pictures. If the committee found this to be the case, it was to report the amount of cash security which the new owner should put up to guarantee performance of his future exhibition contracts, and the distributors agreed not to make exhibition contracts with the new owner unless he either assumed the uncompleted contracts of his predecessor or gave the required security.

Although the avowed purpose of the restraint was to prevent fraud and deceit, it was condemned because of its coercive effect. The Court said (p. 54):

The obvious purpose of the arrangement is to restrict the liberty of those who have representatives on the film boards and secure their concerted action for the purpose of coercing certain purchasers of theatres by excluding them from the opportunity to deal in a free and untrammelled market.

In the present case, without the colorable justification of preventing deceit or unfairness, the distributor defendants and Interstate have combined for the purpose of coercing subsequent-run exhibitors by excluding them from the opportunity to deal in a free and untrammelled market in negotiating for the right to exhibit the best of the new feature pictures, whose supply the distributors control.

The restraints in this case are peculiarly obnoxious since they are the product of a combination of two sets of monopolists, the one having a monopoly of first-run exhibitions and the other a substantial monopoly of the supply of pictures available for exhibition. Even in the absence of monopoly, an alliance between two or more groups of interests, to obtain certain reciprocal advantages by restraining the trade of third persons, is illegal under the Sherman Act. *Brims v. United States*, 272 U. S. 549.

C. The restrictions unduly and unreasonably restrained interstate commerce even if, as appellants contend, they were merely the product of a series of wholly independent agreements between Interstate and the several distributor defendants

Even though the restrictions imposed upon subsequent-run exhibitors were solely the product of separate and independent agreements between Interstate and the several distributor defendants, the question whether these restrictions effected an undue and unreasonable restraint of interstate commerce must be determined in the light of their actual operation and effect. In determining such operation and effect, the fact that all the distributor defendants agreed to impose the restrictions cannot be ignored. Under these circumstances the restraint to which the subsequent-run exhibitor is subjected is plainly coercive restraint since there is no source from which he can obtain a supply of

the pictures covered by the restrictions, pictures which are a prime necessity in his business, without complying with the restrictions. On the other hand, if some of the distributors had agreed to impose the restrictions and others had not, the subsequent-run exhibitor would not have been compelled to comply with the restrictions in order to obtain pictures of the superior type shown in Interstate's Class "A" theatres (although he could not have so obtained *all* such pictures), and the restraint upon his operations would have been far less coercive and burdensome.

If it be true, as appellants contend, that the various distributors did not unite in a joint undertaking to bring about imposition of the restrictions by all of them, at least it cannot be denied that they carried out their separate agreements to impose restrictions with the knowledge that all other distributors were doing likewise. Irrespective of whether or not there was such knowledge when the agreements with Interstate for the 1934-1935 season were entered into, such knowledge necessarily existed when the distributors all continued these agreements the two following seasons. Accordingly, if knowledge of the action taken by others be essential in order to judge the character and effect of the restrictions in the light of such action by others, this knowledge existed.

Not only were the restraints which were imposed actually coercive in character, but, as we have pre-

viously shown (*supra*, pp. 58-65) they were inequitable, harsh, and arbitrary in the manner of their application to those subjected thereto. In addition, their avowed purpose was to limit competition and to maintain prices. Although not *every* agreement to limit competition or to maintain prices unreasonably restrains trade, it is the exception rather than the rule when an agreement of this kind is permissible under the Sherman Act. Finally, the competition which appellants agreed to restrain was not unfair.

The only ground advanced by appellants in support of the reasonableness of the restraints is that they would benefit the conspiring parties, Interstate and the distributors. The fact that a combination in restraint of trade promotes the economic interests of the parties thereto is, however, no defense. *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 613, *supra*. Indeed, the very fact that the restrictions were intended to strengthen and abet the monopolistic position of Interstate²³ would seem rather an additional rea-

²³ Interstate, in addition to monopolizing the first-run exhibition business in the cities in which it operated (*supra*, pp. 7-8), controlled about 75% of the *entire* exhibition business in these cities. In the 1934-1935 season it paid in license fees to the distributor defendants \$944,452.85 for first-run exhibitions and \$133,366.73 for subsequent-run exhibitions, a total of \$1,077,819.58, and all other exhibitors in these cities paid as license fees to these defendants \$369,504.72 (A. S., pars. 5-6, R. 52-53). Accordingly, Interstate furnished 74% of the total license fees of \$1,447,414.30 paid by exhibitors in Interstate cities.

son for condemning them as undue and unreasonable.

But even if it be assumed that a restraint of interstate commerce designed to promote Interstate's financial interests would constitute a merely reasonable restraint, the restraints which were actually imposed cannot be defended upon this ground since they exceeded any reasonable means or measure for attaining this objective. Appellants' evidence is that the restrictions were needed to protect Interstate's first-run theatres against competition of subsequent-run theatres. Obviously those that are principally competitive are those which most nearly approximate what first-run theatres offer, that is, the better class of subsequent-run house. But these theatres usually exhibit second-run, charge 25¢ for admission, and seldom double bill (*supra*, pp. 59-60) and were therefore not affected by the restrictions. In other words, the chief competition was left untouched. On the other hand, the restrictions bore heavily upon the less favorably situated subsequent-run theatres, particularly those that charged 15¢ for admission and showed pictures fourth-, fifth-, or sixth-run; but these theatres can hardly be considered as being in any degree competitive with Interstate's first-run theatres.

The operator of one subsequent-run theatre testified that his admission price before the restrictions was 15¢, that for five months after the re-

strictions went into effect he tried out the policy of showing restricted pictures two days a week at a 25¢ admission price, but found that, although his patrons demanded such pictures, they would not pay 25¢ for admission, that he therefore had to abandon the showing of restricted pictures, that his attendance was then less than when he had been free to show restricted pictures for 15¢ (R. 113). The harsh and inequitable manner in which the restrictions operated is further illustrated by the testimony of this witness that he had no balcony in his theatre, but that there was a competitive Interstate house charging 15¢ for balcony admission and showing restricted pictures (*ib.*).² Another subsequent-run exhibitor testified that his theatre was in a neighborhood where "there are mostly railroad people and a bunch of Mexicans," that his admission-price was 15¢, that he "tried charging 25¢ and it didn't work," that his customers said that "they wouldn't give two bits in a 15¢ joint" (R. 109-110). Where, as in these cases, the class of patronage is such that it cannot afford even a 25¢ admission, what chance exists that those whom it serves will pay 40¢ or more for admission to Interstate's first-run theatres if restricted pictures are withheld from these theatres?

The admission price restriction is closely analogous to resale price maintenance and agreements

² The admission-price restriction applied only to the admission price to the lower floor.

to maintain resale prices have been repeatedly held to violate the Sherman Act. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *United States v. Colgate & Co.*, 250 U. S. 300; *United States v. Schrader's Son Co.*, 252 U. S. 85, *supra*; *Frey & Son, Inc., v. Cudahy Packing Co.*, 256 U. S. 208. When a distributor furnishes a motion-picture film for exhibition in a theatre and receives payment therefor (called a license fee), this is the substantial equivalent of a sale, and when the exhibitor receiving such film permits members of the public to view the picture upon payment of an admission charge, this is the substantial equivalent of a resale. While the analogy is not exact, there is in the instant case an added element of an unreasonable restraint because the agreement calling for the equivalent of resale price maintenance does not run solely between the parties directly involved, but is the product of agreement between the seller (distributor) and a third person (Interstate).

Appellants cite a number of cases (Br., p. 40) sustaining the validity of the conventional covenant by which the vendor of a going business agrees, as part of the terms of sale, to refrain from competing with his vendee for a limited time and within a limited area. In such instance the party whose trade is restrained voluntarily subjects himself to the restraint and he receives due consideration from the vendee for his covenant. These de-

cisions have no application here, where the persons restrained are coerced by a combination between third persons, where the restraint operates in a harsh and inequitable manner, where its purpose is price maintenance and substantial lessening of competition and where it is in aid of monopolistic conditions.

IV

THE RESTRAINTS IMPOSED UPON SUBSEQUENT-RUN EXHIBITORS ARE NOT REMOVED FROM THE PROHIBITIONS OF THE SHERMAN ACT BY ANY PRIVILEGES OR IMMUNITIES CONFERRED BY THE COPYRIGHT LAW

At the outset, it may be useful to analyze the separate elements of the plan which Interstate initiated in this case in connection with the agreements which followed, since both are part of the total scheme which the appellants seek to bring within the protection of the copyright laws. The situation is as follows:

1. A corporation which had a monopoly of the first-run theatres in the largest cities of Texas sought to restrain competition by subsequent-run theatres.

2. Though it held no copyrights itself, nevertheless this corporation through its monopoly position was able to exert great pressure upon those who did own the copyrights.

3. It circularized these copyright owners, pointing out the advantage of assisting it in furthering

its monopoly position, imposing burdensome restriction on subsequent-run competition.

4. Its letter contained a direct threat that would be forced to use its monopoly position against any copyright owner who refused "request."²³

5. The copyright owners yielded. It was to the financial advantage to do so for two reasons: first, the ordinary reason for restraining of trade, i. e. temporary gain from higher prices as opposed to a long run policy of wider distribution at low prices; second, the very clear and compelling reason that a battle between the copyright owners and a corporation which dominated the exhibition outlets in a great section of the country would be costly.

6. The result is that a corporation which owned no copyright was able to effect an actual combination with the majority of copyright owners which (1) imposed restrictions upon all its competitors and (2) which put limitation on the times and places at which copyrighted pictures not included in the plan could be shown.

Are such schemes protected by the copyright law? If they are, it means that anyone who dominates the distribution of any product may use the advan-

²³ The threat read as follows (A. S., par. 11, R. 64):

"In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices."

tages of his position to induce the owners of either patents or copyright to enter into a plan for controlling the prices and practice of any industry. If the owners of the patents or copyrights do not agree, the monopolist will go elsewhere for his product. If they do agree, the industry will be controlled from top to bottom. To state such a proposition is to refute it.

Appellants do not deny, indeed in their brief on the former appeal (pp. 35-36) they admitted, that the copyright owners themselves could not organize to achieve such a result. *Standard Oil v. United States*, 283 U. S. 163, 174; *Straus v. American Publisher Ass'n*, 231 U. S. 222. Yet they claim that it is permissible for an outsider to drive them into such an organization by utilizing his power over the distributing field.

To put the matter more simply, appellant's argument is that A, B and C who own patents or copyrights cannot form themselves in a tight organization to control the field. However, if a ringleader comes along, who owns no copyrights or patents, he may form them into a regiment by frankly stating his plan to control prices and practice, pointing out its monopoly advantages and adding such coercive inducements as his position permits.

If this is so, the prohibition against patent or copyright owners combining is a mere form of words. All that is required to accomplish the re-

sult is an organizer who does not happen to own a patent or a copyright himself.

The constitutional provision which marks the limits of the powers of Congress to pass or the Courts to apply patent and copyright laws reads as follows: "The Congress shall have power * * *

To promote the progress of science and useful arts by securing to authors and inventors the exclusive right to their respective writings and discoveries." Both the patent and copyright laws have always been interpreted with these purposes in mind.

In *Standard Sanitary Manufacturing Co. vs. U. S.*, 226 U. S. 20, the Court refused recognition due patent rights where it was of the opinion that their exercise was a cloak for the formation of a combination in unreasonable restraint of interstate commerce. The Court said (p. 49):

Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

In that case a non-patent owner devised the scheme to control the patents in the industry involved. He did it by persuading the patent owner of the financial advantage (p. 38) "which would come to his company by an elimination of 'seconds' and removing them as competitors of the better articles of the Standard, confining the competition

to such articles of which the Standard produced 50%. The manager of the Standard and that company yielded to the representation of these advantages." There followed an agreement which in the language of the Court had the following effect (p. 48):

The trade was, therefore, practically controlled from producer to consumer and the potency of the scheme was established by the cooperation of 85% of the manufacturers and their fidelity to it was secured not only by trade advantages but by what was practically a pecuniary penalty, not inaptly termed in the argument, "cash bail."

While in this case, the holder of the patent acted in conjunction with a trade association, and in the present case Interstate did not deal with the distributors through a trade association, the general objectives were the same in each case, to stabilize prices and to increase the profits of the combining parties. Also, the principal defense was similar to the one here. We quote from the *Standard Sanitary* case (p. 40):

The contention of the defendant then is that the Standard Company's position and power as owner of the patent, and Wayman's were identical.²⁶ What it could have done, it is contended, he could do, and its relation to the trade and the relation of other manufacturers to the trade clearly

²⁶ Wayman was the individual who initially owned no patents and who initiated the agreement of the patent owners.

demonstrate, it is further contended, that as that company could have made the contracts, Wayman could do so.

The Court, in holding that there was an illegal agreement in restraint of trade, necessarily rejected this defense.

A. The principles governing decision of the copyright privileges claimed by appellants

In considering the part, if any, which copyright privileges play in this case, it is well to start with a statement of the nature of the copyright privilege. What the law confers is the exclusive right to copy or publish, just as the patent law gives the exclusive use to make, use and vend. The extent of these privileges is therefore a matter of interpretation and the process of interpretation involves protecting the privileges accorded by the copyright or patent law without so extending these privileges as to permit, under the guise of their exercise, encroachment upon the general policy of the statutory and common law in favor of freedom of trade. The process of interpretation through judicial decision involves, therefore, making an appropriate adjustment of these sometimes conflicting lines of public policy represented, on the one hand, by the reward to the inventor or author which the patent and copyright laws are designed to secure and, on the other hand, by condemnation of restraint of trade and monopoly by both the common law and the federal antitrust laws.

We submit that the course of decision has been and should be guided by these and other considerations of public policy. The words of the statute are too indefinite to permit interpretation of their meaning to be determined by purely dialectical reasoning. Although decision may often be couched in this form, the result achieved depends upon the particular premises selected and public-policy considerations necessarily enter into selection of the premises.

Appellants' contention is that any condition on exhibition which the owner of a copyrighted motion-picture may attach to a license to exhibit is within the owner's copyright privileges if the condition increases the return which he derives from his grant of the right to exhibit. While this Court has said that, in exercising the granted right to vend, the patent owner may license another to exercise this right "upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure" (*United States v. General Electric Co.*, 272 U. S. 476, 489), this statement of one of the rules applied in interpreting the extent of the patent privilege leaves open the crucial question of what is "reasonably" within such reward.

There are many instances of limitations or conditions imposed as an incident to exercise of the patentee's exclusive right to make, use and vend which have been held to be not within any privilege conferred by the patent law although the limitations or conditions would increase the return re-

ceived by the patentee from exercise of his exclusive rights. It is not within his patent privilege to sell upon condition that the vendee will use the patented article with unpatented materials or supplies furnished by the patent owner. (*Motion-Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502.) It is not within his patent privilege to fix the resale price of the patented article (*Straus v. Victor Talking Machine Co.*, 243 U. S. 490; *Bauer & Cie v. O'Donnell*, 229 U. S. 1) or to sell upon agreement by the vendee to observe resale prices fixed by the patent owner (*United States v. Schrader's Son, Inc.*, 252 U. S. 85, *supra*). It is not within his patent privilege to license use of a patented combination on the condition that such use be limited to use in conjunction with an unpatented article or commodity furnished by the patent owner. (*Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27; *Leitch Mfg. Co. v. Barber Co.*, 302 U. S. 458.)

On the other hand, certain other conditions and limitations have been held to be "reasonably" within the reward which the patent law secures to the patent owner. He is within his patent privilege in fixing the price at which one whom he has licensed to make and vend may sell (*United States v. General Electric Co.*, *supra*) and in determining the use for which an article may be sold by one whom he has licensed to make and vend, subject to sale for such restricted use (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175, affirmed on rehearing on November 21, 1938).

The vice in appellants' reliance upon the language of the *General Electric* case consists in treating this language as if it were a part of the statutory law and therefore an actual source of rights, whereas, in fact, it merely sets forth one, but not the only, principle applied in determining whether the privilege of imposing a particular limitation or condition may be implied from the words of the statute.

In determining the appropriate limits to the exclusive right given the patent or copyright owner, weight is given to the general policy of the law, to which patent and copyright grants are limited exceptions, against monopolization of trade or markets. This Court has said that the monopoly conferred by the patent law should not be expanded by interpretation so as to permit the owner of a patent for a product to "monopolize the commerce in a large part of unpatented materials used in its manufacture"; or the owner of a patent for a process to "secure a partial monopoly on the unpatented material employed in it"—these limitations sought to be imposed by the patentee being "beyond the legitimate scope" of its monopoly. *Carbice Corp. v. American Patents Development Corp.*, 283 U. S. 27, 32. *supra*.

Likewise, the patent or copyright grant is inherently limited to the extent that exercise of the apparent grant would bring it in conflict with statutory or other legal prohibitions. (See the *Carbice*

case, note 3, pp. 32-33.) In *Standard Sanitary Manufacturing Co. v. United States*, 226 U. S. 20 (supra), the Court refused recognition to patent rights which it was assumed that the defendants possessed, since the Court was of the opinion that the exercise of patent rights there involved was a mere cloak or screen for the formation of a combination in unreasonable restraint of interstate commerce. The Court said (p. 49):

Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Appellants, in order to sustain the immunity which they claim based upon copyright privilege must establish two propositions:

(1) That the owner of a copyrighted motion-picture is within privileges given him by the copyright law if he includes in licenses to exhibit a prescription of the licensee's minimum price of admission and a prohibition of exhibition in conjunction with other pictures (which the licensee is authorized to exhibit under license from other copyright owners)

(2) That such a copyright owner is exercising a privilege derived from the copyright law if he enters into a binding agreement with his first licensee to prescribe the minimum admission price of

subsequent licensees and to prohibit double-billing by such licensees.

B. The owner of a copyrighted motion picture is not exercising a privilege derived from the copyright law when he fixes the minimum admission price to a motion-picture theatre or prohibits double-billing during the period that exhibition of the copyrighted picture is authorized

The owner of a copyright on a motion-picture, in giving a license to exhibit, is exercising privileges derived from the copyright grant when he fixes the time, place, and duration of exhibition and the amount of the licensee's payments, but we submit that he is not within these privileges when he undertakes to fix the minimum admission price which the licensee may charge its theatre patrons during the period the licensed picture is being exhibited. Such a requirement embraces more than the exhibition privilege derived from the copyright owner. It is, we submit, a matter of judicial notice that news reels, travel pictures, and "comics," or some of these, are almost universally shown in motion-picture theatres together with the feature picture. Accordingly, if the owner of the copyright on the feature picture undertakes to control the licensee's admission price, he extends his control to matters which lie beyond the confines of his copyright. The situation is analogous to that where a patent owner attempts to extend his limited monopoly over a machine or over a product to unpatented material

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or supplies used in or in connection with the machine or product.

When the licensor of one copyrighted picture fixes the exhibitor's minimum admission price, this restrains not only the trade of the exhibitor, but also the trade of licensors of other pictures shown in the same exhibition. They suffer if the minimum admission price is set at such a high level that it reduces attendance at the theatre and, consequently, license fees based upon receipts from attendance.

Since a motion-picture theatre which acquires the right to exhibit a picture upon paying a fee therefor and then admits the public to exhibition upon payment of an admission price is, in effect, reselling a purchased product, the decisions condemning resale price maintenance, whether or not the article be patented, furnish a strong analogy for regarding an admission-price restriction imposed by the licensor of the picture as governed by the general law rather than by special copyright privilege.

The considerations which have been referred to in connection with an admission-price restriction are applicable to some extent to a double-billing restriction. The restriction interferes not only with the trade of the licensee but with trade of other licensors.

C. An admission-price and a double-billing restriction imposed upon subsequent licensees of a copyrighted motion-picture, under and pursuant to an agreement to impose these restrictions entered into between the copyright owner and the first licensee, are not within any privilege derived from the copyright law

If it be assumed that a distributor defendant would be within his copyright privileges in imposing an admission-price or a double-billing restriction in contracts granting the right to exhibit, it does not follow that the distributor is within these privileges when it imposes these restrictions on subsequent-run exhibitors under and pursuant to an agreement with Interstate so to act. In the latter case the restraints are imposed by a combination between one who has a copyright privilege and one who has not. We have seen that a restraint of trade imposed by a combination of patents is not given immunity by the patent law (*supra*, p. 77). *A fortiori*, a restraint imposed by a combination between a copyright owner and a non-copyright owner is outside such immunity.

The distinction which we are drawing between the imposition of restrictions on licensees by the copyright owner acting for himself alone and imposition of the same restrictions by virtue of agreement between him and a third person is more than technical; it rests upon a substantial difference in the relation of the restrictions to the copyright privilege. The copyright owner, acting individually,

will impose the restrictions only if he believes that they will promote his own interests as owner of the copyright. Where, however, he imposes the restrictions on subsequent licensees because of agreement with the first licensee, the interests of the first licensee rather than those of the copyright owner will probably be the dominant factor in imposition of the restrictions. If, as is true in the present case, the first licensee has a monopoly of the best and largest exhibition theatres, it can take advantage of its monopoly position to procure, through the medium of distributors of motion pictures, imposition of restraints upon its competitors. The restraints then really flow from the acts and will of the non-copyright owner; the copyright owner is merely the medium through whom the restraints are made effective.

The restrictions upon admission charges and against double-billing did not arise out of the voluntary act of the copyright owner employing these devices to realize a more ample reward from his copyright. Although the restrictions were embodied in, they did not emerge from, a contract between the party initiating the restrictions and the party accepting them. They did not eventuate from negotiation and a meeting of minds between the owner of the copyright on the picture and the licensee-exhibitor upon whom the restrictions operated. Thus, the restrictions stem from neither of the two sources from which alone they could

claim the sanction of the law. On the contrary, they give effect to the will, the interest, the demand of the first-run exhibitor whose interest in the copyright was confined to his privilege of first exhibition and whose concern with subsequent exhibitions was to create for himself, at the expense of his weaker rivals, a competitive advantage. If the restraints had represented merely an effort to exploit the advantages of copyright to the full, Interstate would have had no part in creating the edifice of restriction.

Appellants assert (Br., p. 33) that the copyright owner may, by restrictive covenant, protect the granted right of exhibition. The principal authority which they cite, *Manners v. Morosco*, 252 U. S. 317, was not a suit for infringement and involved the construction of a contract, not any question as to the extent of the privileges derived from copyright law. The case held that a contract giving exclusive rights to the stage production of a play, without mention of motion-picture exhibition rights, contained an implied reservation of these rights by the copyright owner and also an implied covenant on his part not to destroy the value of the granted right of stage production by permitting contemporaneous motion-picture production of the play. The decision, apart from the fact that it concerned contract rights in the general domain of the law, dealt with a totally different situation from that presented here. The clearance provisions of

Interstate's contracts gave it the very protection against simultaneous exhibition to which the Court gave recognition in the *Manners* case; the restrictions here involved only became effective 45 days or more after Interstate's right of first-run exhibition had expired (*supra*, p. 59).

Appellants also cite (Br., p. 35) the holding in *Bement v. National Harrow Co.*, 186 U. S. 70, that the Sherman Act is not violated when a patent owner, in licensing another to manufacture and sell certain patented articles, agrees not to license any other person to manufacture and sell the same patented articles. Appellants seem to rely upon the fact that the Court said (p. 94) that this was "a proper provision for the protection of the individual who is the licensee." All that this statement means is stated by the Court itself in the same sentence, namely, that such a provision "is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article."

Appellants contend (Br., p. 38) that because a distributor could give Interstate an exclusive license, it can exercise the lesser right of agreeing with Interstate as to what use the distributor shall make of his copyright after the privilege of exhibition given Interstate has expired. A similar argument was advanced in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502, *supra*, namely, that because a patentee may withhold his

patent altogether from public use he must logically be permitted to impose any conditions which he chooses upon any use which he may allow of it. This Court rejected the contention, saying (p. 514):

The defect in this thinking springs * * * from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however, are subject to the rules of general as distinguished from those of the patent law.

See also the similar reasoning in the *Carbice* case, *supra*, p. 31.

To give an exclusive license is a primary exercise of the right to exclude conferred by patent and copyright law. To attach conditions and limitations upon licensees, by reason of agreement between the patent or copyright owner and a third person, even though that person be a prior licensee, is "a horse of a different color."

Appellants seem to contend that the distributors' agreements with Interstate tend to protect the revenue received by Interstate from first-run exhibition and that agreement to protect the revenue of the first-run licensee by imposing the admission-price and double-billing restrictions on subsequent-run exhibitors was therefore a proper exercise of a privilege conferred by copyright law. But, leav-

ing other considerations aside, a short answer is that the restrictions provided for in the agreements with Interstate were not reasonably confined to protection of Interstate's revenue from first-run exhibition—the restrictions chiefly affected subsequent-run exhibitors who were not substantially competitive with Interstate's first-run theatres (*supra*, p. 72).

Possibly appellants will also contend that the agreements with Interstate tended to increase the total license fees received by the distributors from exhibition licenses and that the restrictions provided for in these agreements therefore served to increase the copyright owner's reward from exercise of his exclusive right of exhibition. One answer is that already given, that the means adopted to increase the copyright owner's reward, i. e., agreement with the first licensee to impose restrictions upon subsequent licensees, is not within any copyright privilege (*supra*, pp. 87-89). A second answer is that the agreements would not tend to increase the distributor's total license fees derived from exhibition licenses if total license fees are measured, not solely by those paid by exhibitors in Interstate cities where the restrictions were imposed, but by those paid by exhibitors throughout the State of Texas (*supra*, p. 46). The latter is the true measure of the reward derived by the distributor from exercise of his right to license exhibition of copyrighted pictures.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be affirmed.

✓ ROBERT H. JACKSON,
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THOROLD JOHNSON DEYRUP,
Special Attorney.

DECEMBER 1938.

SUPREME COURT OF THE UNITED STATES.

Nos. 269, 270.—OCTOBER TERM, 1938.

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al., Appellants,

269

vs.

The United States of America.

Appeals from the District Court of the United States for the Northern District of Texas.

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants,

270

vs.

The United States of America.

[February 13, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

This case is here on appeal under § 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. § 29, and § 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. § 345, from a final decree of the District Court for northern Texas restraining appellants from continuing in a combination and conspiracy condemned by the court as a violation of § 1 of the Sherman Anti-Trust Act, 26 Stat. 209, 15 U. S. C. § 1, and from enforcing or renewing certain contracts found by the court to have been entered into in pursuance of the conspiracy. 20 F. Supp. 668. Upon a previous appeal this Court set aside the decree and remanded the cause to the District Court for further proceedings because of its failure to state findings of fact and conclusions of law as required by Equity Rule 70½. 304 U. S. 55. The case is now before us on findings of the District Court specifically stating that appellants did in fact agree with each other to enter into and carry out the contracts, which the court found to result in unreasonable and therefore unlawful restraints of interstate commerce.

Appellants comprise the two groups of defendants in the District Court. The members of one group of eight corporations which are distributors of motion picture films, and the Texas agents of two of them, are appellants in No. 270. The other group, corporations and

individuals engaged in exhibiting motion pictures in Texas, and some of them in New Mexico, appeals in No. 269. The distributor appellants are engaged in the business of distributing in interstate commerce motion picture films, copyrights on which they own control, for exhibition in theatres throughout the United States. They distribute about 75 per cent. of all first-class feature films exhibited in the United States. They solicit from motion picture theatre owners and managers in Texas and other states applications for licenses to exhibit films, and forward the applications, when received from such exhibitors, to their respective New York offices where they are accepted or rejected. If the applications are accepted, the distributors ship the films from points outside the state of exhibition to their exchanges within those states, from which, pursuant to the license agreements, the films are delivered to the local theatres for exhibition. After exhibition the films are reshipped to the distributors at points outside the state.

The exhibitor group of appellants consists of Interstate Circuit, Inc., and Texas Consolidated Theatres, Inc., and Hoblitzelle and O'Donnell, who are respectively president and general manager of both and in active charge of their business operations. The two corporations are affiliated with each other and with Paramount Pictures Distributing Co., Inc., one of the distributor appellants.

Interstate operates forty-three first-run and second-run motion picture theatres, located in six Texas cities.¹ It has a complete monopoly of first-run theatres in these cities, except for one in Houston operated by one distributor's Texas agent. In most of these theatres the admission price for adults for the better seats at night is 40 cents or more. Interstate also operates several subsequent-run theatres in each of these cities, twenty-two in all, but in all but Galveston there are other subsequent-run theatres which compete with both its first- and subsequent-run theatres in those cities.

Texas Consolidated operates sixty-six theatres, some first- and some subsequent-run houses, in various cities and towns in the Rio Grande Valley and elsewhere in Texas and in New Mexico. In some of these cities there are no competing theatres, and in some leading cities there are no competing first-run theatres. It has no theatres in the six Texas cities in which Interstate operates. That

¹ A first-run theatre is one in which a picture is first exhibited in any given locality. A subsequent-run theatre is one in which there is a subsequent exhibition of the same picture in the same locality.

Interstate and Texas Consolidated dominate the motion picture business in the cities where their theatres are located is indicated by the fact that at the time of the contracts in question Interstate and Consolidated each contributed more than 74 per cent. of all the license fees paid by the motion picture theatres in their respective territories to the distributor appellants.²

On July 11, 1934, following a previous communication on the subject to the eight branch managers of the distributor appellants, O'Donnell, the manager of Interstate and Consolidated, sent to each of them a letter³ on the letterhead of Interstate, each letter

² Payments of license fees by Interstate to distributor appellants in the 1934-35 season aggregated \$1,077,819.58. Payments by all other exhibitors operating theatres in the same cities aggregated \$369,594.72. Texas Consolidated payments for the same period aggregated \$594,863.68. All other exhibitors operating in the same cities paid \$47,928.23.

³ "INTERSTATE CIRCUIT, INC.,
Majestic Theatre Building,
Dallas, Texas.

July 11, 1934.

Messrs.: J. B. Dugger, Herbert MacIntyre, Sol Sachs, C. E. Hilgers,
Leroy Nickel, J. B. Underwood, E. S. Olmuth, Deak Roberts.

Gentlemen:

On April 25th, the writer notified you that in purchasing product for the coming season 34-35, it would be necessary for all distributors to take into consideration in the sale of subsequent runs that Interstate Circuit, Inc., will not agree to purchase produce to be exhibited in its 'A' theatres at a price of 40¢ or more for night admission, unless distributors agree that in selling their product to subsequent runs, that this 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening.

In addition to this price restriction, we also request that on 'A' pictures which are exhibited at a night admission price of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called policy of double-features.

At this time the writer desires to again remind you of these restrictions due to the fact that there may be some delay in consummating all our feature film deals for the coming season, and it is imperative that in your negotiations that you afford us this clearance.

In the event that a distributor sees fit to sell his product to subsequent runs in violation of this request, it definitely means that we cannot negotiate for his product to be exhibited in our 'A' theatres at top admission prices.

We naturally, in purchasing subsequent runs from the distributors in certain of our cities, must necessarily eliminate double featuring and maintain the maximum 25¢ admission price, which we are willing to do.

Right at this time the writer wishes to call your attention to the Rio Grande Valley situation. We must insist that all pictures exhibited in our 'A' theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢. Regardless of the number of days which may intervene, we feel that in exploiting and selling the distributors' product, that subsequent runs should be restricted to at least a 25¢ admission scale.

The writer will appreciate your acknowledging your complete understanding of this letter.

Sincerely,

(Signed) R. J. O'DONNELL."

naming all of them as addressees, in which he asked compliance with two demands as a condition of Interstate's continued exhibiting the distributors' films in its 'A' or first-run theatres at a night admission of 40 cents or more.⁴ One demand was that the distributors "agree that in selling their product to subsequent runs, that 'A' product will never be exhibited at any time or in any theatre at a smaller admission price than 25¢ for adults in the evening." The other was that "on 'A' pictures which are exhibited at a night admission of 40¢ or more—they shall never be exhibited in conjunction with another feature picture under the so-called practice of double features". The letter added that with respect to the "Rio Grande Valley situation", with which Consolidated alone was concerned, "We must insist that all pictures exhibited in our theatres at a maximum night admission price of 35¢ must also be restricted to subsequent runs in the Valley at 25¢".

The admission price customarily charged for preferred seating at night in independently operated subsequent-run theatres in Texas at the time of these letters was less than 25 cents. In seventeen of the eighteen independent theatres of this kind whose operations were described by witnesses the admission price was less than 25 cents. In one only was it 25 cents. In most of them the admission was 10 cents or less. It was also the general practice in those theatres to provide double bills either on certain days of the week or with a feature picture which was weak in drawing power. The distributors appellants had generally provided in their license contracts for a minimum admission price of 10 or 15 cents, and three of them included provisions restricting double-billing. But none was at that time previously subject to contractual compulsion to continue such restrictions. The trial court found that the proposed restrictions constituted an important departure from prior practice.

The local representatives of the distributors, having no authority to enter into the proposed agreements, communicated the proposal to their home offices. Conferences followed between Holzelle and O'Donnell, acting for Interstate and Consolidated, and representatives of the various distributors. In these conferences each distributor was represented by its local branch manager.

⁴ A Class 'A' picture is a "feature picture" having five reels or more film each approximately 1,000 feet in length, shown in theatres of the type in Texas cities charging 40 cents or more for adult admission at night. Approximately fifty per cent. of the pictures released by the distributor defendants in the Texas cities in 1934-1935 were Class 'A' pictures.

by one or more superior officials from outside the state of Texas. In the course of them each distributor agreed with Interstate for the 1934-35 season to impose both the demanded restrictions upon their subsequent-run licensees in the six Texas cities served by Interstate, except Austin and Galveston. While only two of the distributors incorporated the agreement to impose the restrictions in their license contracts with Interstate, the evidence establishes, and it is not denied, that all joined in the agreement, four of them after some delay in negotiating terms other than the restrictions and not now material. These agreements for the restrictions—with the immaterial exceptions noted⁵—were carried into effect by each of the distributors' imposing them on their subsequent-run licensees in the four Texas cities during the 1934-35 season. One agreement, that of Metro-Goldwyn-Mayer Distributing Corporation, was for three years. The others were renewed in the two following seasons and all were in force when the present suit was begun.

None of the distributors yielded to the demand that subsequent runs in towns in the Rio Grande Valley served by Consolidated should be restricted. One distributor, Paramount, which was affiliated with Consolidated, agreed to impose the restrictions in certain other Texas and New Mexico cities.

The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Fort Worth, Houston and San Antonio; that they carried out the agreement by imposing the restrictions upon their subsequent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon "low-income members of the community" patronizing the theatres of these exhibitors was to withhold from them altogether the "best

⁵ The Metro-Goldwyn-Mayer Distributing Corporation agreement with Interstate did not include Houston, where it operated through a subsidiary a first run theatre, and where it did not until the 1936-1937 season license any subsequent run pictures. It agreed with Interstate to impose the restrictions in Houston for the 1936-1937 season.

entertainment furnished by the motion picture industry;" and that the restrictions operated to increase the income of the distributors and of Interstate and to deflect attendance from later-run exhibitors who yielded to the restrictions to the first-run theatres of Interstate.

The court concluded as matters of law that the agreement of the distributors with each other and those with Interstate to impose the restrictions upon subsequent-run exhibitors and the carrying out of the agreements into effect, with the aid and participation of Hoblitzelle and O'Donnell, constituted a combination and conspiracy in restraint of interstate commerce in violation of the Sherman Act. It also concluded that each separate agreement between Interstate and a distributor that Interstate should subject itself to the restrictions in its subsequent-run theatres and that the distributors should impose the restrictions on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act.

It accordingly enjoined the conspiracy and restrained the distributors from enforcing the restrictions in their license agreements with subsequent-run exhibitors⁶ and from enforcing the contracts or any of them. This included both the contracts of Interstate with the distributors and the contract between Consolidated and Paramount, whereby the latter agreed to impose the restrictions upon subsequent-run theatres in Texas and New Mexico served by it.

Appellants assail the decree of the District Court upon three principal grounds: (a) that the finding of agreement and conspiracy among the distributor appellants to impose the restrictions upon later-run exhibitors is not supported by the court's subsidiary findings or by the evidence; (b) that the several separate contracts entered into by Interstate with the distributors are within the protection of the Copyright Act and consequently are not violations of the Sherman Act; and (c) that the restrictions do not unreasonably restrain interstate commerce within the provisions of the Sherman Act.

The Agreement Among the Distributors.

Although the films were copyrighted, appellants do not deny that the conspiracy charge is established if the distributors

⁶ The injunction against the double feature restriction excepted from operation two distributors, and the agent of one of them, which had previously made a practice of including such a restriction in their license agreement

agreed among themselves to impose the restrictions upon subsequent-run exhibitors. *Straus v. American Publishers' Association*, 231 U. S. 222; *Paramount Famous Lasky Corp. v. United States*, 262 U. S. 30. As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.

The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they were made; from the substantial unanimity of action taken upon them by the distributors; and from the fact that appellants did not call as witnesses any of the superior officials who negotiated the contracts with Interstate or any official who, in the normal course of business, would have had knowledge of the existence or non-existence of such an agreement among the distributors. This conclusion is challenged by appellants because not supported by subsidiary findings or by the evidence. We think this inference of the trial court was rightly drawn from the evidence. In the view we take of the legal effect of the cooperative action of the distributor appellants in carrying into effect the restrictions imposed upon subsequent-run theatres in the four Texas cities and of the legal effect of the separate agreements for the imposition of those restrictions entered into between Interstate and each of the distributors, it is unnecessary to discuss in great detail the evidence concerning this aspect of the case.

The O'Donnell letter named on its face as addressees the eight local representatives of the distributors, and so from the beginning each of the distributors knew that the proposals were under consideration by the others. Each was aware that all were in active competition and that without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business and good will of the subsequent-run and independent exhibitors, but that with it there was the prospect of increased profits. There was, therefore, strong motive for concerted action, full advantage of which was taken by Interstate and Consolidated in presenting their demands to all in a single document.

There was risk, too, that without agreement diversity of would follow. Compliance with the proposals involved a radical departure from the previous business practices of the industry, a drastic increase in admission prices of most of the subsequent theatres. Acceptance of the proposals was discouraged by at least three of the distributors' local managers. Independent exhibitors met and organized a futile protest which they presented to the representatives of Interstate and Consolidated. While as a result of independent negotiations either of the two restrictions without the other could have been put into effect by any one or more of the distributors and in any one or more of the Texas cities served by Interstate, the negotiations which ensued and which in fact did result in modifications of the proposals resulted in substantially unanimous action of the distributors, both as to the terms of the restrictions and in the selection of the four cities where they were to operate.

One distributor, it is true, did not agree to impose the restrictions in Houston, but this was evidently because it did not wish to issue licenses to any subsequent-run exhibitor in that city, where its own affiliate operated a first-run theatre.⁷ The proposal was unanimously rejected as to Galveston and Austin, as was the request that the restrictions should be extended to the cities of the Rio Grande Valley served by Consolidated. We may infer that Galveston was omitted because in that city there were no subsequent-run theatres in competition with Interstate. But we are unable to find in the record any persuasive explanation, other than agreed concealment of action, of the singular unanimity of action on the part of the distributors by which the proposals were carried into effect as to the four Texas cities but not in a fifth or in the Rio Grande Valley. Numerous variations in the form of the provisions in the distributors' license agreements and the fact that in later years two of them extended the restrictions into all six cities, do not weaken the significance or force of the nature of the response to the proposals made by all the distributor appellants. It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without a full understanding that all were to join, and we reject as beyond a reasonable range of probability that it was the result of mere chance.

⁷ See footnote 5.

Appellants present an elaborate argument, based on the minutiae of the evidence, that other inferences are to be drawn which explain, at least in some respects, the unanimity of action both in accepting the restrictions for some territories and rejecting them for others. It is said that the rejection of Consolidated's proposal for the Rio Grande Valley may have been due to the fact that the demand with respect to that territory differed materially from that directed to the six Texas cities. It is urged that the proposal for the Valley was that all pictures once shown in a first-run theatre with a 35 cents admission should not thereafter be exhibited in any city in the Valley for less than 25 cents admission, while the demand in behalf of Interstate with respect to the six Texas cities was that 'A' pictures, after a first-run in theatres charging 40 cents admission or more, should not thereafter be exhibited in the same city for less than 25 cents admission. But reference to the O'Donnell letter shows that both demands related to pictures shown in a first-run or 'A' theatre and were not in terms limited to subsequent-run exhibitions in the same city in which the first run had occurred. The record discloses no reason for the distinction taken between first-run theatres in the six cities charging an admission of 40 cents or more and those in the Valley served by Consolidated charging 35 cents, other than the fact that the cities there were smaller.

The trial court, interpreting the letter in the light of the whole evidence, which showed unmistakably that one purpose of both demands was to protect first-run houses from competition of subsequent-run houses, concluded that the substance of the proposals in one case as in the other was that the restrictions upon the subsequent-run theatres were to be imposed only in the same city in which the first run had occurred. We agree with its conclusion, but in any event since the demand made by Interstate was phrased as broadly as that made by Texas Consolidated, both as to the kind of pictures affected and the scope of the restriction, we can find no basis for saying that one was more limited in its essentials than the other, or that any explanation is thus afforded of the unanimous acceptance of the demands of Interstate in four of the six cities affected by the proposal, and the unanimous rejection of the demand of Consolidated. In the face of this action and similar unanimity with respect to other features of the proposals, and the strong motive for such unanimity of action, we decline to speculate whether there may have been other and more legitimate reasons for such

action not disclosed by the record, but which, if they existed, were known to appellants.

The failure of the distributors to make any substantial changes in their business practices in dealing with exhibitors in Austin for the season 1934-35; their failure to unite in imposing the restriction as to admission prices in subsequent-run theatres in that city; and their failure to enter into the proposed restrictive agreement with Interstate for Austin, are likewise unexplained by any inferences to be drawn from the record. The facts that three of the distributors continued their established practice there, as elsewhere, of placing restrictions against double-billing in their license contracts; that the 25 cents admission restriction appeared in the Austin license agreements of one distributor for that year; and that certain of the distributors included the restrictions in their Austin license agreements in later years, do not militate against this conclusion. Taken together, the circumstances of the case which we have mentioned, when uncontradicted and with no more explanation than the record affords, justify the inference that the distributors acted in concert and in common agreement in imposing the restrictions upon their licensees in the four Texas cities.

This inference was supported and strengthened when the distributors, with like unanimity, failed to tender the testimony, at their command, of any officer or agent of a distributor who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action. When the proof supported, as we think it did, the inference of such concert, the burden rested on appellants of going forward with the evidence to explain away or contradict it. They undertook to carry that burden by calling upon local managers of the distributors to testify that they had acted independently of the other distributors, and that they did not have conferences with or reach agreements with the other distributors or their representatives. The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character.

Runkle v. Burnham, 153 U. S. 216, 225; *Kirby v. Talmadge*, 160 U. S. 379, 383; *Bilokumsky v. Todd*, 263 U. S. 149, 153, 154; *Vojtauer v. Commissioner of Immigration*, 273 U. S. 103, 111, 112; *Mammoth Oil Company v. United States*, 275 U. S. 13, 52; *Local 167 v. United States*, 291 U. S. 293, 298.

While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which, we will presently point out, was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan. The evidence is persuasive that each distributor early became aware that the others had joined. With that knowledge they renewed the arrangement and carried it into effect for the two successive years.

It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States*, 253 Fed. 212, 213, aff'd, 249 U. S. 47; *Levey v. United States*, 92 F. (2d) 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Association v. United States*, 234 U. S. 600; *Lawlor v. Loewe*, 235 U. S. 522, 534; *American Column Co. v. United States*, 257 U. S. 377; *United States v. American Linseed Oil Co.*, 262 U. S. 371.

The Protection Afforded by the Copyright Act to the Contracts between Interstate and the Distributors.

The decree below enjoined enforcement and renewal of the separate agreements between each distributor and Interstate and of the contract between Paramount and Consolidated imposing the restrictions upon later-run theatres in certain cities in Texas and New Mexico, although the court found no conspiracy among the distrib-

utors to effect this latter restriction. Appellants assail this of the decree on the ground that such separate agreements, entered into without agreement or concert among the distributors, is a legitimate exercise of the monopoly secured to the distributors by their copyrights.

Under § 1 of the Copyright Act, 35 Stat. 1073, 17 U. S. C. the owners of the copyright of a motion picture film acquire the right to exhibit the picture and to grant an exclusive or restricted license to others to exhibit it. See *Manners v. Morosco*, 252 U. S. 317. Appellants argue that the distributors were free to license the films for exhibition subject to the restrictions, just as a patentee in a license to manufacture and sell the patented article may fix the price at which the licensee may sell it. *Bement v. National Harrow Co.*, 186 U. S. 70; *United States v. General Electric Co.*, 272 U. S. 476. That the parallel is not complete is obvious. Because a patentee has power to control the price at which his licensee may sell the patented article, it does not follow that the owner of a copyright can dictate that other pictures may not be shown with the licensed film or the admission price which shall be paid for the entertainment which includes features other than the particular picture licensed. Cf. *Motion Picture Patents Co. v. Universal Manufacturing Co.*, 243 U. S. 502; *Carbice Corporation v. American Patent Development Corporation*, 283 U. S. 27; *Leitch Manufacturing Co. v. Barber Co.*, 302 U. S. 458.

We have no occasion now to pass upon these or related questions. Granted that each distributor, in the protection of his copyright monopoly, was free to impose the present restrictions on his licensees, we are nevertheless of the opinion that they were free to use their copyrights as implements for restraining competition in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. The restrictions imposed on Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to Interstate's will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor. Interstate was able to acquire control and impose its will by force of its monopoly of first-run theatres in the principal cities of Texas and the threat to use its monopoly position against copyright owners who did not yield to its demands. The purpose and ultimate effect of each of its contracts with the distributors was to restrain its competitors in the theatre business.

business by forcing an increase in their admission price and compelling them through the double feature restriction to make their entertainment less attractive, and to preclude the distributors for the specified time from relaxing the pressure of the restrictions upon them.

The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season, competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents, which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of its terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals.

A contract between a copyright owner and one who has no copyright, restraining the competitive distribution of the copyrighted articles in the open market in order to protect the latter from the competition, can no more be valid than a like agreement between

two copyright owners or patentees. *Straus v. American Publishers' Association*, *supra*; *Paramount Famous Lasky Corp. v. United States*, *supra*; see *Standard Oil Co. v. United States*, 283 U. S. 174. In either case if the contract is effective, as it was here, competition is suppressed and the possibility of its resumption precluded by force of the contract. An agreement illegal because it suppresses competition is not any less so because the competitive article is copyrighted. The fact that the restraint is made even more effective by making the copyright subservient to the contract does not relieve it of illegality. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20.

Unreasonableness of the Restraint.

The restrictions imposed on the subsequent-run exhibitors were harsh and arbitrary. As we have seen, they were forced upon distributors and upon their customers as a result of the agreements entered into by Interstate with the distributors. Compliance with the restrictions was a uniform condition of exhibition of the films by subsequent-run theatres. There were wide differences in the location and character of the subsequent-run houses in the four Texas cities, which afforded basis for the corresponding differences in admission prices charged before the restrictions were adopted. Due to the practice of the distributors in establishing clearance periods between the first and each successive run, later runs are progressively less attractive. The poorer class of theatres, exhibiting the later runs, sometimes offered a double bill as an offsetting inducement for patronage. Despite these differences which normally affect the admission price that could be charged by subsequent-run theatres, the 25 cents admission price was to be required of all alike, forcing increases in admission price ranging from 25 per cent. to 150 per cent.

The trial court found that practically all of the later-run exhibitors who bowed to the restrictions would not have done so for the compulsion of their need of showing the restricted pictures and that the result was to increase the income of the distributors and Interstate and diminish that of the exhibitors who accepted the restrictions, by deflecting attendance from subsequent-run theatres to Interstate's first-run theatres. There was no testimony that such loss was offset by the higher admission price of the second-run theatres, and there was evidence that some of the poorer class of second-run-theatres suffered loss of income by yielding to

restrictions. Some who did not yield were compelled to forego exhibition of the distributors' feature pictures. The effect was a drastic suppression of competition and an oppressive price maintenance, of benefit to Interstate and the distributors but injurious alike to Interstate's subsequent-run competitors and to the public.

The benefit, at such a cost does not justify the restraint. *East-ern States Lumber Association v. United States*, *supra*, 613; *Duplex Co. v. Deering*, 254 U. S. 443, 468; *Anderson v. Shipowners Association*, 272 U. S. 359, 363; *Bedford v. Stone Cutters' Association*, 274 U. S. 37, 47. It does not appear that the competition at which they were aimed was unfair or abnormal. Cf. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 363, 372. The consequence of the price restriction, though more oppressive, is comparable with the effect of resale price maintenance agreements, which have been held to be unreasonable restraints in violation of the Sherman Act. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *United States v. Schrader's Son, Inc.*, 252 U. S. 85. Cf. *United States v. Trenton Potteries Co.*, 273 U. S. 392, 397, *et seq.*

We think the conclusion is unavoidable that the conspiracy and each contract between Interstate and the distributors by which those consequences were effected are violations of the Sherman Act and that the District Court rightly enjoined enforcement and renewal of these agreements, as well as of the conspiracy among the distributors.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

A true copy.

Test :

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

Nos. 269, 270.—OCTOBER TERM, 1938.

Interstate Circuit, Inc., Texas Consolidated Theatres, Inc., Karl Hoblitzelle, et al. Appellants.

vs.

The United States of America.

Paramount Pictures Distributing Company, Inc., Vitagraph, Inc., RKO-Radio Pictures, Inc., et al., Appellants.

vs.

The United States of America.

On Appeal from the United States District Court for the Northern District of Texas.

[February 13, 1939.]

Mr. Justice ROBERTS.

I think the decree should be reversed. The bill charges that the two exhibitor defendants which were under the same management, showing that subsequent run houses in Dallas, Houston, San Antonio, Fort Worth, Austin, and Galveston, the largest cities in Texas, and in Waco, Wichita Falls, Tyler, Amarillo, Texas, and Albuquerque, New Mexico, could not operate without the showing of feature films, in order to strengthen these two defendants' monopoly in first run exhibition of such feature films, and to monopolize the business of exhibiting feature films in second or subsequent run houses operated by them in those cities, conspired to notify the distributor defendants that, during the 1934-1935 season, and subsequent seasons, the latter must advise second and subsequent run exhibitors that such feature films could not be operated in second or subsequent run houses for less than twenty-five cents adult lower floor admission or as part of a double feature program and that, unless the distributor defendants would do so, the exhibitors would not maintain a night adult admission price of forty cents or more for the first run exhibitions of feature films licensed by the distributor defendants to them. The bill charged that, upon

receipt of advices to this effect from the exhibitor defendants, distributor defendants joined in the unlawful combination and conspired with the exhibitor defendants to place such restrictions on licenses to second or subsequent run exhibitors.

The parties entered into a stipulation of facts, in lieu of evidence, binding upon them for the purposes of suit, and further agreed that any party might introduce additional relevant and material evidence bearing upon the issues "but not inconsistent with any fact contained in" the stipulation. Plaintiff and defendant introduced additional evidence. The testimony of second or subsequent exhibitors called as witnesses by plaintiff and defendants may be said to have been, in some respects, conflicting. The evidence offered by the plaintiff and the defendants with respect to the negotiations between the exhibitor defendants and the distributor defendants, and the conduct of the latter, was uncontradicted on all points material to a resolution of the fact issues in the case.

The District Court made ten findings (numbered from 12 to 21 inclusive) of subsidiary or evidentiary facts and based upon these specific findings one conclusion of ultimate fact,—that the distributor defendants conspired amongst themselves to take uniform action upon the proposals of Interstate and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston, and San Antonio.

The appellants contend, and I think their contention is sound, that the subsidiary findings are insufficient to support the fact conclusion and that these subsidiary findings are, in a number of instances, contrary to, or unsupported by, the agreed statements of facts and, in other instances, are in the teeth of uncontradicted and unimpeached testimony.

Since this is a direct appeal from the District Court in an equity suit, and the findings are challenged, this court is bound to review them and to determine whether they have a proper basis in the evidence. I think such a review demonstrates the lack of support for the critical basic findings. No good purpose would be served by a detailed analysis of what I consider erroneous and unsupported findings. But I am of opinion that the findings ought not to stand and that the conclusion that there was a conspiracy, either between the distributor defendants or between them and the Interstate Corporation, is unjustified. The opinion of this court accepts

closely follows these findings of fact but, while approving the conclusion of the District Court, finds it unnecessary to give detailed consideration to the appellants' challenge of the accuracy and sufficiency of the subsidiary findings, for the reason that it holds, as matter of law, on uncontradicted facts, that there were eight separate conspiracies unreasonably to restrain trade in interstate commerce in virtue of the agreement of each of the distributor defendants with Interstate to impose restrictions on subsequent run exhibitors in certain cities.

Separately considered, I think these agreements are not conspiracies contemplated by the Sherman Act and the holding that they are goes far beyond anything this court has ever decided. The distributor defendants are owners of copyrights on moving picture films. The copyright law gives them the exclusive privilege of securing performances of the photoplays recorded. On the other hand, there are competing concerns whose copyrighted feature films are licensed for the purpose of production. In addition, there are copyrighted films of lower classes well known to the trade. These lower class films are usually licensed to houses that charge lower prices for first run exhibition than those charged by theatres showing feature films, and both the feature films, second and subsequent run, and other films of less attraction and less expensively produced, are exhibited by so-called second run houses. The latter pay a much reduced rate to obtain the feature films for exhibition in the same city after their original showing as feature films in first run houses. Many of the subsequent run houses charge low admission prices, and sometimes put on double bills.

Interstate is the largest licensee of first run feature films in Texas. It has many more first run houses than any other Texas exhibitor. Its first run houses are in the largest cities where the highest admission prices can be obtained. The distributors are, of course, interested in the conservation and protection of the necessarily high license fees which they must obtain for first runs of feature pictures. These are far higher than those received for the second showings of the same pictures in the same city. They naturally have to protect themselves and their licensees from the destruction of the good will and drawing power of these feature films in their first runs. In an effort to accomplish this, by requiring minimum admission charges and prohibiting double billing in

subsequent runs of feature pictures, they may, of course, narrow the opportunity of second run houses to obtain feature pictures.

I agree that while the Copyright Act gives a distributor a so-called monopoly, that monopoly cannot be made the cover for a conspiracy to restrain trade or commerce.¹ But I think it obscures the issue to use the phrase "monopoly". What the copyright gives is much the same as what is conferred by the patent law.² The exhibition of a photoplay, were it not for the copyright law, would amount to a public disclosure and the use of the material would thereafter be open to the public. All the Copyright Act does is to create a form of property in the literary or artistic production of the author or artist. The Act attaches to the product of his brain certain attributes of property. One of these is the right of exclusive use similar to that attaching to physical property; another is the right to sell the production with consequent exclusion of enjoyment in the vendee; another is the right to license others to use the product as one might lease or bail real or personal property. The monopoly, so called, amounts to no more than the attachment to the work of an author or composer or producer of motion pictures of the same rights as inhere in other property under the common law. Therefore, the standing of the distributor defendants toward their customers, as respects the productions proposed to be licensed, differs in no way from that of the owner of any other property toward those to whom he leases or licenses its use or sale.

The decision of the court necessarily means that the owner of a product may not agree with an important customer that the former will not sell the product at a cut rate to the latter's competitor in the same city in which he conducts his business. The decision leads to the necessary conclusion that a manufacturer whose skill resides in the production of apparatus of superior quality may not, in consideration of a price to be paid him for the bailment of that apparatus to certain users in a city, contract, as an inducement to the users, that he will not bail the same apparatus at lower or destructive prices to his bailees' competitors in the same city. I think it has never been suggested that an agreement of the kind mentioned, restricted in time and place, amounts to a conspiracy or an unreasonable restraint of trade or commerce. The right to

¹ *Straus v. American Publishers' Assn.*, 231 U. S. 222; *Paramount Pictures Corporation v. United States*, 282 U. S. 30.

² See *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 186.

such agreements is essential to the realization of the full value of the property. It is conceded that the distributor defendants might grant exclusive licenses to Interstate, and that an exclusive license to Interstate would not constitute a conspiracy under the Sherman Act, or confer any cause of action on others who desired licenses in the same city; and this remains true however much such action by the licensor might injure the business of others seeking licenses.

I am of opinion that the restrictions in the licenses of second run exhibitors were not unreasonable restraints of commerce under the Sherman Act. There is no contention that the action of the distributor defendants discouraged competition between them either for the business of Interstate or for that of subsequent run licensees. The restrictions upon the latter were not intended to increase license fees paid by them or those paid by Interstate; they were imposed to prevent destruction of the good will which made possible the continued exhibition of first run feature pictures and to avoid decrease of the revenue from those pictures then and theretofore enjoyed under licenses to Interstate and other first run feature exhibitors. The reasonableness of the restrictions must be judged by the situation of the industry and the propriety of its protection from practices which would seriously injure it.³ The question always is whether an agreement unduly restrains competition and, in applying this test, consideration must be given both to the intent and effect of the agreement in the light of realities.

It is settled that the proprietor of a copyright may grant an exclusive license; that is, may covenant with his licensee that he will not license anyone else, as the owner of a patent may grant a similar exclusive license to make or sell the patented article.⁴ It is settled that the distributor defendants could lawfully stipulate with their licensees, whether first run or subsequent run, as to the admission price to be paid by patrons and that, so to do, would not be a violation of the Sherman Act.⁵ But it is said that if, in order to protect its earnings from first run licenses by enabling its licensees to pay the demanded consideration, the distributor agrees

³ *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 358, 359, 360, 362. Compare *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

⁴ *Manners v. Morosco*, 252 U. S. 317; *Bement v. National Harrow Co.*, 186 U. S. 70.

⁵ *United States v. General Electric Co.*, 272 U. S. 476, 488-490; *Standard Oil Co. v. United States*, 283 U. S. 163, 179.

to restrict in anywise the exhibition of the same feature by a subsequent run exhibitor he has violated the Anti-Trust Law. In the nature of things this cannot be true. The record discloses that the distributors have always provided a so-called "clearance" between the first run and subsequent runs of feature pictures. By this is meant that the distributors refuse to license a subsequent run theatre to show such a feature until the expiration of a given number of days or months after the picture has been shown at a first run house. This is a perfectly natural procedure and is obviously required to protect the value of the first run license. Under the decision here, however, if a distributor should agree with a first run house that if it will contract for a given feature picture at a given price the distributor will impose a clearance on subsequent run houses this would be a conspiracy in restraint of trade. Other restrictions tending to preserve the value of the first exhibition of a feature picture such as those challenged in this case are just necessary and I suppose, in the absence of agreement would be held just as lawful as the restriction known as a clearance.

The opinion of the court recognizes that a distributor may lawfully agree that its exhibitor licensee shall have the exclusive right to exhibit a copyrighted play but condemns the agreements here in controversy although a much less drastic restraint respecting licenses to subsequent run exhibitors results from the provision of licenses with a restriction as to price and as to double billing.

Once the property rights conferred by the Copyright Law are recognized it must follow that the principles governing the right to use, sell, or turn to account other forms of property are equally applicable here. We have often held that a contract containing a covenant in restraint of trade is valid if the restraint is reasonable and necessary for the protection of the right granted by the owner of the property. Examples of such lawful contracts are those in which the vendor of a business sold as a going concern agrees that for the protection of its value he will for a period of years refrain from engaging in the same business in a prescribed territory,⁶ and those by the vendor with the vendee of an article to be used in a business or trade that it shall not be used so as to interfere with

⁶ Cincinnati Packet Co. v. Bay, 200 U. S. 179; Oregon Steam Navigation Co. v. Winsor, 20 Wall. 64, 67.

the vendor's business;⁷ which are held not to offend the Sherman Act if the prohibition has a reasonable relation to the value of the business of the vendor.

The Government stresses the fact that each of the ~~exhibitors~~ *distributors* must have acted with knowledge that some or all of the others would grant or had granted Interstate's demand. But such knowledge was merely notice to each of them that if it was successfully to compete for the first run business in important Texas cities it must meet the terms of competing distributors or lose the business of Interstate. It could compete successfully only by granting exclusive licenses to Interstate and injuring subsequent run houses by refusing them licenses,—a course clearly lawful,—or by doing the less drastic thing of agreeing to protect the good will of its pictures by putting necessary and not severely burdensome restrictions upon subsequent run exhibitors, which I think equally lawful.

Mr. Justice McREYNOLDS and Mr. Justice BUTLER join in this opinion.

⁷Fowle v. Park, 131 U. S. 88; Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 250, 252; Moore v. New York Cotton Exchange, 270 U. S. 593; United States v. General Electric Co., 272 U. S. 476; United States v. Addyston Steel Co., 85 Fed. 271.

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